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No. 95

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THE MASON & DIXON LINES, INC.
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND, et al.
Respondents.

AND

CENTRAL TRANSPORT, INC. and CENTRAL CARTAGE CO.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

WILLARD J. LINDLEY
CENTRAL CARTAGE CO.
12225 Stephens Road
Warren, Michigan 48089
(810) 939-7000

PATRICK A. MORAN*
EVANS & LUPTAK, P.L.C.
2500 Buhl Building
Detroit, Michigan 48226
(313) 963-9625
Attorneys for Petitioners

Counsel of Record

74pp

QUESTION PRESENTED

Whether the award of above cost "market rate" attorneys fees rather than the amount of fees that a lay organization litigant actually incurred by utilizing its staff attorneys under Section 1132(g) of the Multiemployer Pension Plan Amendments Act is inappropriate when:

1. The award creates a split in the Circuits as the Courts of Appeal for the Federal Circuit, Eleventh Circuit and District of Columbia Circuit limit staff attorneys fees awards to reimbursement of actual expenditures while the Seventh Circuit awards market rate attorneys fees, encouraging forum shopping; and

2. Neither the language of the statute nor its legislative history support the assumption of the Seventh Circuit that Congress intended to award market rate attorneys fees whether or not they were actually incurred.

LIST OF RESPONDENTS

Respondents, collectively styled Pension Fund are: Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall, Trustee in The Mason & Dixon Lines, Inc. Petition. For the Petition by Central Transport, Inc. and Central Cartage Co., the Respondents are Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health & Welfare Fund and Robert J. Baker, Trustee.

STATEMENT OF CORPORATE AFFILIATION

Central Cartage Co. and The Mason & Dixon Lines, Inc. are both wholly owned subsidiaries of CenTra, Inc. Central Transport, Inc. is an wholly owned subsidiary of U.S. Truck Company, Inc. CenTra, Inc. and U.S. Truck Company, Inc. have no parent company and each is owned in major part by the same individual shareholders. Neither Central Cartage Co., nor Central Transport, Inc., nor The Mason & Dixon Lines, Inc. own any direct or indirect interests in any other company.

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The Mason & Dixon Lines, Inc., and Central Transport, Inc. and Central Cartage Co. respectfully petition this Court to issue a Writ of Certiorari to review the Opinions and Judgments of the United States Court of Appeals for the Seventh Circuit entered on February 7, 1996 (the "Mason & Dixon Case") and January 22, 1996 (the "Central Cartage Case") respectively.

OPINIONS BELOW

The trial court's opinion and award of damages in the Mason & Dixon Case is set forth in Appendix A. The Opinion of the United States Court of Appeals for the Seventh Circuit in the Mason & Dixon case is set forth in Appendix B and the Opinion of the United States Court of Appeals for the Seventh Circuit in the Central Cartage Case is set forth in Appendix C.

JURISDICTION

The judgments of the Seventh Circuit Court of Appeals below were entered in the Mason & Dixon Case on February 7, 1996 and in the Central Cartage Case on January 22, 1996. On April 16, 1996, Petitioners Central Transport, Inc. and Central Cartage Co. were granted an extension of time so that this Petition could be filed as a consolidated Petition on the filing date appropriate to the Petition of Mason & Dixon. Jurisdiction in this Court is based upon 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132 is set forth in Appendix D.

STATEMENT OF THE CASE

A. The Mason & Dixon Case.

On December 13, 1993, Respondents, Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall, Trustee (collectively the "Fund"), sued Petitioner, The Mason & Dixon Lines, Inc. ("Mason & Dixon") as a contributing employer under 29 U.S.C. §1132 in the United States District Court for the Northern District of Illinois seeking to compel Mason & Dixon to submit to an audit of its employee work history records for the period of January 1, 1989 through December 26, 1992 (the "Audit"). The Fund also sought its audit and litigation costs, including reasonable attorneys fees under 29 U.S.C. §1132.

On March 9, 1994, the Fund filed a motion for partial summary judgment for an order that Mason & Dixon submit to the Audit within 14 days and renewed its request for attorneys fees and costs. On March 17, 1994, Mason & Dixon filed a cross motion for summary judgment arguing that there was no case or controversy for the court to decide because it had already agreed to allow the Audit. Mason & Dixon had merely requested that its over-burdened audit staff be allowed to complete ongoing audits before commencing the Audit. One of those audits was being conducted by the Fund itself.

On April 28, 1994, the district court denied Mason & Dixon's motion and granted in part and denied in part the Fund's motion. The court noted that Mason & Dixon had agreed to provide access to the records and ordered Mason & Dixon to provide access "as soon as possible, even if it must hire additional labor to satisfy plaintiffs' demands." The court ordered that Mason & Dixon compensate the Fund "for the reasonable attorneys fees they incurred as a result of bringing

the present action." The court, however, denied the Fund's request for audit costs holding that the Fund must bear the costs it would ordinarily incur in auditing Mason & Dixon.

In a joint written status report, filed with the district court on November 30, 1994, the litigants stated that the Audit had in fact commenced. The Fund further stated that it was awaiting the comp' tion of the Audit before deciding whether to amend the complaint to add a count seeking to collect unpaid contributions.

On February 9, 1995, the Fund filed its motion for an award of attorneys fees and costs in the amount of $17,897.43. In support of the requested fees, the Fund provided a time log of the attorneys involved and an affidavit by Robert A. Coco, one of its staff attorneys. The affidavit stated that Mr. Coco's time is "billed at" $125 per hour, a rate at or below the rate charged by attorneys in Chicago for comparable work with comparable experience. The affidavit further stated that attorneys Albert M. Madden and Thomas J. Weithers assisted Mr. Coco with the case. Their time is "billed" at the rate of $150 and $125 per hour respectively.

Mason & Dixon filed an objection that the Fund's attorneys' time entries were unreasonable, and that the Fund is not entitled to attorneys fees at the market rate. Mason & Dixon also moved for reconsideration of the court's April 28, 1994 award of fees, stating that no fees should be awarded when Mason & Dixon had already agreed to allow the Audit.

The Fund, thereafter, amended its request for fees, seeking the amount of $20,075 in attorneys fees and $593.68 in litigation costs. The district court found that "the hourly rates charged by the plaintiffs reasonable and commensurate with the prevailing market rates for attorneys of similar practice and

experience." The court, however, found that "20,000 plus dollars in fees where the audit apparently did not reveal any deficiencies, or at least did not require plaintiffs to amend their complaint to pursue delinquent contributions, seems facially incongruous." Accordingly, the court reduced the number of hours charged by the Fund and awarded it $16,913 in attorneys fees and $220.48 for related costs. The final judgment was entered by the district court on March 29, 1995.

Mason & Dixon filed its notice of appeal on April 27, 1995. After Mason & Dixon and the Fund filed their respective briefs but prior to the date which had been scheduled for oral argument, the Seventh Circuit issued an opinion in Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co., 76 F.3d 114 (7th Cir. 1996) after reading the briefs filed by Mason & Dixon and the Fund in the Mason & Dixon Case. Without hearing oral argument, the Seventh Circuit issued its February 7, 1996 Order holding that the Cartage decision, 76 F.3d 114, controlled resolution of the issues on appeal in the Mason & Dixon Case.

B. The Central Cartage Case.

In the Central Cartage Case, the Fund, the Central States, Southeast and Southwest Areas Health and Welfare Fund and Robert J. Baker, Trustee (collectively "Fund") sought attorneys fees against Central Cartage Co. ("Cartage") under 29 U.S.C. §1132(g)(2)(D) after the Seventh Circuit Court of Appeals affirmed a judgment entered in the Fund's favor in Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co., 69 F.3d 1312 (7th Cir. 1995).

As it had done in the Mason & Dixon Case, the Fund sought market rate attorneys fees for the work of its in-house counsel through a Motion For Modification of Decision filed

November 14, 1995. Thereafter, Cartage filed a response which recognized the similarity of issues concerning market rate attorneys fees in the appeal of the Mason & Dixon Case and requested that the Seventh Circuit deny the attorneys fees sought or alternatively stay any decision until after it decided the merits of Mason & Dixon's appeal. The Seventh Circuit did neither, and instead elected to read the briefs filed by the Fund and Mason & Dixon and issued an opinion in Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co., 76 F.3d 114 (7th Cir. 1996).

REASONS FOR GRANTING CERTIORARI

I.

A WRIT SHOULD BE GRANTED BECAUSE THE OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS CREATES A SPLIT IN THE OPINIONS OF THE CIRCUIT COURTS BY BEING CONTRARY TO THE RULE EARLIER ADOPTED BY THREE OTHER CIRCUIT COURTS

The decision of the Seventh Circuit creates a split in the circuits concerning the award of attorneys fees under federal statutes. In fact, the Seventh Circuit highlighted that split in its opinion. The Seventh Circuit acknowledged that decisions of the Federal and District of Columbia Circuits issued after Blum v. Stenson, 465 U.S. 886 (1984), support Petitioners' argument that fee awards be limited to reimbursement of actual costs and practically invited Petitioners to bring this Petition to resolve the split in authority:[1]

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[1] More than 150 state and federal statutes allow the award of attorneys fees. Breger, *Compensation Formulas for Court Awarded Attorney*

> Central Cartage [and Mason & Dixon by reference in the Mason & Dixon Order] wants us to put Blum aside in favor of Devine v. National Treasury Employees Union, 805 F.2d 384, 386-88 (Fed. Cir. 1986); Goodrich v. Department of the Navy, 733 F.2d 1578, 1580-81 (Fed. Cir. 1984) . . . . This may be a sound distinction, but Central Cartage encounters a deeper problem. Cases such as Devine and Goodrich have never represented the law in this circuit.

Opinion p. 3 (emphasis added).

A. The Rule of the Seventh Circuit Converts Section 1132(g) into a Measure of Punitive Damages Contrary to the Intention of Congress.

The Rule of the Seventh Circuit awarded attorneys fees to the Fund in excess of the fees it actually incurred.[2] The fees awarded in excess of actual legal expenses constitute profits to

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Fees, 47 LAW AND CONTEMPORARY PROBLEMS 249 (1984). See 30 A.L.R. 3d 1443 (state awards as an element of punitive damages). See also Ramos v. Lamm, 539 F. Supp. 730, 755 (D. Colo. 1992). Many of the statutes award the fees to the prevailing party; such statutes are exceptions to the American tradition that each litigant will bear its own costs of litigation, (see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 248 (1975), and result in a legislative adoption of the English tradition, awarding attorneys fees to the prevailing party as a matter of course. See generally, Walker & Walker, The English Legal System ch.20 (5th ed. 1980), and Goodhart, Costs, 38 Yale L.J. 849, 852 (1929). A statutory exception to the American rule is required before fee shifting as in the English rule may apply. Berger, 47 LAW AND CONTEMPORARY PROBLEMS at 251.

[2] The Fund never disclosed its actual costs, arguing that the Fund was not capable of determining those costs.

the Fund and penalties to the Petitioners. If Congress had intended to authorize fee awards as punitive damages under Section 1132(g), it would have said so in the statute or its legislative history. Neither the language nor the legislative history of Section 1132(g) supports the conclusion of the Seventh Circuit.

There are two subsections to Section 1132(g) which provide for attorneys fees. The first of those subsections, Section 1132(g)(1) does not mention penalties against a litigant at all. The second, Section 1132(g)(2), provides for penalties on unpaid pension contributions, but not penalties measured by attorney fee awards.

Section 1132(g)(2) authorizes penalties in the calculation of interest. It provides that a court may award the greater of double interest on delinquent pension contributions or liquidated damages equal to 20% of the amount of such delinquent pension contributions. There is no mention in the statute of doubling attorneys fees or awarding attorneys fees 20% in excess of the actual fees incurred as there is for the calculation of interest.[3]

If Congress intended attorneys fee awards as a penalty, but chose not to expressly state that benefit in the statute, it would have at least discussed the issue in the legislative history of the Section. The legislative history of Section 1132(g) contains no language supporting the interpretation of the Seventh Circuit. It is unreasonable to speculate that Congress

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[3] It is quite certain that the awards of market rate fees in both the Mason & Dixon Case and the Central Cartage Case are in excess of the 20% penalty calculation that Congress provided for delinquent contributions and perhaps in excess of the 100% penalty calculation that Congress provided for interest on delinquent contributions.

meant to authorize penalties in attorneys fee awards under Section 1132(g)(2)(D) as it did in interest calculations under Section 1132(g)(2)(C), but failed to provide statutory language or supporting legislative history.[4]

The Seventh Circuit has legislated a "per se" rule of attorneys fees awards in ERISA actions that grants a pension fund a windfall profit on unnecessary, pedestrian litigation. The rule means that in the Seventh Circuit, Chicago outside counsel market rate attorneys fees[5] should be awarded to a pension fund

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[4] In fact, the Seventh Circuit itself found that the legislative history of ERISA is entirely different than the legislative history of the Civil Rights Act:

> The history of the Civil Rights Attorney's Fees Awards Act indicates as clearly as a legislative history can that the purpose of the statute (despite its neutral wording) was to encourage meritorious civil rights litigation by allowing prevailing plaintiffs to obtain an award of attorney's fees almost as a matter of course but prevailing defendants only if the suit was frivolous. See H.R. Rep. No. 1558, 94th Cong., 2d Sees. 6-7 (1976), S. Rep. No. 1011, 94th Cong., 2d Sess. 4-5 (1976), U.S. Code Cong. & Admin. News 1976, p. 5908. There is nothing comparable in the legislative history of ERISA; nor do pension plan participants and beneficiaries constitute a vulnerable group whose members need special encouragement to exercise their legal rights, like a racial minority.

Bittner v. Sadoff & Rudov Ind., 728 F.2d 820, 829 (7th Cir. 1984).

[5] Defining the relevant market may require consideration of sub-markets as well. For example, the geographic location of the litigation requires one definition of market rate. The type of work requires a different definition of market rate:

> As to the "geographic" dimension, one might be tempted to view the provision of legal services as part of a

regardless of the relief being sought by the litigation, regardless of whether the employer is actually liable for delinquent contributions and regardless of the legal sophistication required to bring the action. There is nothing to support that rule and nothing to recommend it.

By contrast, the District of Columbia and Federal Circuits define attorneys fee awards to lay associations entirely differently (and in the submission of Petitioners, properly). In Anderson v. Department of Treasury, 648 F.2d 1 (D.C. Cir. 1979), the D.C. Circuit noted that the federal Privacy Act which has an attorneys fee shifting provision was not to reward the successful litigant, but rather to ensure that the costs of litigation do not present a barrier to average citizens seeking to secure their private information. In Anderson, the court awarded the actual costs of plaintiff's pre-paid legal services

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> national market. Certainly the billing rates in New York differ markedly from those in Indianapolis. Examination of the "product" dimension also suggests a host of questions. Are the attributes of civil rights litigation and corporate litigation sufficiently similar to justify equivalent market rates? Would a corporate client view an experienced civil rights attorney as a substitute for counsel in corporate litigation? With regard to the production dimension, does the fact that corporate and civil rights legal services can be provided by the same attorney indicate a single market? Or should they be treated as potential entrants to the same market? Would the necessary adjustment on the part of the attorney be minor or major? What additional elements of time, cost, and education would be required in a change in the type of practice? That these questions have not been addressed, much less answered, demonstrates the lack of serious market analysis by courts that subscribe to a uniform market rate.

Breger, *Compensation Formulas for Court Awarded Attorney Fees*, 47 LAW AND CONTEMPORARY PROBLEMS 249, 261-62 (1984).

rather than market rate fees because the rights being litigated, while important rights, were rights of the private litigant, rather than a guarantee of benefits to the general public. That is surely the case here.

In Devine v. National Treasury Employees Union, 805 F.2d 384 (Fed. Cir. 1986), the Federal Circuit interpreted the award of attorneys fees under the Equal Access to Justice Act, which contains language concerning the measure of attorneys fees to be awarded in greater detail than the language of Section 1132(g). Despite statutory language giving a successful litigant market rate attorneys fees, the court held that the award of attorneys fees to the union which prevailed in the litigation through its staff attorneys should be limited to the per hour cost of such attorneys to the union rather than the market rates of outside counsel who were never engaged in the litigation. The court distinguished this Court's decision in Blum v. Stenson, 465 U.S. 886 (1984) because Blum dealt with awards of attorneys fees under the Civil Rights Act in which Congress had clearly set forth its intention to create "private attorneys general" to bring cases. Devine at 388.

In Goodrich v. Department of the Navy, 733 F.2d 1578 (Fed. Cir. 1984), the Court of Appeals for the Federal Circuit held that a salaried union attorney is only entitled to attorneys fees calculated at a cost-plus-overhead rate under the Civil Service Reform Act, even if the fees were to be deposited into a segregated legal representation fund. The court reasoned that if a union used its general funds to furnish legal services to its members, fees paid to the legal fund in excess of costs would

permit the union to indirectly use legal fees for ordinary expenses.[6]

More recently, in Harper v. Better Business Services, Inc., 961 F.2d 1561 (11th Cir. 1992), the Eleventh Circuit upheld the district court's decision to limit the amount of attorneys fees to be awarded to plaintiff's lawyer who was employed by a union legal services agency. The court found that an award of "reasonable attorneys fees" under the Fair Debt Collection Practices Act could not be based upon the prevailing market rate because it might result in an inappropriate economic benefit to the union and might create ethical problems associated with sharing attorneys fees with nonlawyers. Id. at 1564.

The reasonable attorneys fee provisions in ERISA are similar to those considered in Harper, Goodrich, NTEU,

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[6] Regardless of whether or not petitioner expects to expend the attorney fee awards solely for litigation-related purposes, the fact remains that the application of the market-value formula to the fee award here would allow petitioner to profit from the underlying activities of its attorneys in this matter. The extent of such a profit, as the Administrative Law Judge correctly recognized, would be commensurate with the extent to which such an award would relieve petitioner of the burden of financing its litigation activities through its general revenue funds. The well-established ethical principles recognized in NTEU [National Treasury Employees Union v. Department of Treasury, 656 F.2d 848 (D.C. Cir. 1981)] prohibit this result.

Goodrich at 1580 quoting Wells v. Schweiker, 82 FMSR ¶7053 (1982).

Anderson and Devine.[7] None of those other decisions awarded market rate fees. Nonetheless, the Seventh Circuit's Rule adopted a "per se" rule to attorneys fee awards under ERISA, elevating it to the position that the Civil Rights Act only acquired through the express intention of Congress. There is absolutely no justification for concluding that this multi-billion dollar Fund needs the same measure of attorneys fees as might be awarded to a minority discriminatee. Moreover, the vast majority of civil rights cases would award only fees actually incurred to even the minority discriminatee.[8] It requires several gigantic leaps to equate ERISA to the Civil Rights Act, and then to equate this Fund to a minority discriminatee, and lastly to award this Fund attorneys fees on a higher level than most courts would give to the minority discriminatee.[9]

The fee award in the Central Cartage Case was pursuant to an order to remit delinquent contributions and presumably

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[7] How does one determine the prevailing market rate once that particular market has been defined? The public does not have general information concerning the hourly rate (or the measure) of fees charged by law firms over broad geographic and work product markets. In fact, when the hourly rates of Washington firms were placed on record by affidavit in Laffrey v. Northwest Airlines, 572 F. Supp. 354 (D.D.C. 1983), it was sufficiently newsworthy to be the subject of an article. See What a D.C. Hour is Worth: Who Charges What?, Nat'l L.J, Aug. 15, 1983, at 2, col.4.

[8] Unless the litigant used a legal aid service within the Blum holding. Blum v. Stenson, 465 U.S. 886 (1984).

[9] An individual plaintiff suing to enforce his or her pension rights in an ERISA action poses a more sympathetic plaintiff. Even then, justifying an award of attorneys fees in excess of actual expenditure would still require equating the protection of rights under ERISA (for which there is no supportive statutory or legislative history language), with rights under the Civil Rights Act (which are expressly provided for in both the statutory language and in its extensive legislative history).

was under Section 1132(g)(2)(D). The fee award in the Mason & Dixon Case was pursuant to an order to commence an audit and does not fit under Section 1132(g)(2)(D). Mason & Dixon never disputed the right of the Fund to conduct its audit. Mason & Dixon merely asked that the commencement of the Audit be delayed until its audit staff could catch up with other audits that were on-going -- principally one earlier commenced by this same Fund. The Fund did not demand payment of delinquent contributions from Mason & Dixon in its complaint -- it only sought to commence the audit that Mason & Dixon voluntarily was allowing, albeit to commence at a later date. Throughout the litigation, the Fund advised the district court that it intended to amend its complaint to add the demand for delinquent contributions when contributions were found to be due. During the course of the Audit, the Fund finally admitted that no additional contributions were due from Mason & Dixon. Accordingly, the Mason & Dixon fee award was entered under Section 1132(g)(1).

Mason & Dixon did not challenge the authority of the Fund to conduct the Audit. Mason & Dixon was not delinquent in its contributions. Therefore, no special level of legal expertise was required to maintain the Mason & Dixon Case. The action only sought court authority to conduct an audit to which Mason & Dixon did not object. The Audit was intended to ferret out additional contributions that Mason & Dixon had failed to make, but the Audit found that Mason & Dixon had already made all contributions required of it. A first year law graduate could have adequately handled the Mason & Dixon Case for the Fund. The Seventh Circuit itself has recognized that under certain circumstances "[a] judge might conclude that the plaintiff did not need a top-flight counsel in a no-brainer

case." Gusman v. Unisys Corporation, 986 F.2d 1146, 1151(7th Cir. 1993).[10]

The Seventh Circuit's Rule results in payment of above cost attorneys fees to an organization that is not engaged in the practice of law. The opinion expressly provides that there was no fee splitting between the Fund and in staff attorneys because the award of attorneys fees was made directly by the court to the Fund. Presumably then, if the award of attorneys fees had been made to the Fund's staff attorneys who then remitted them to the Fund, there would have been fee splitting. With all due respect, that is form over substance.

The fees awarded were "earned" by the attorneys working for the Fund. If the Fund had concluded that the work to be performed required the sophistication of the Chicago market place, then the Fund could have hired outside counsel and paid them the market rate fees which were the subject of the Award. Instead, the Fund instructed its salaried staff attorneys to launch the actions. Whatever amount is awarded for attorneys fees greater than the salaries paid by the Fund to their staff attorneys is profit gleaned from the practice of law. It can be nothing else.

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[10] In Gusman, the Seventh Circuit limited the award of attorneys fees in an age discrimination case, finding that "[a] client who retains a lawyer with an hourly rate of $100, when the average in the community is $150, is entitled to collect from his adversary only $100 for each hour reasonably expended." Id. at 1149-50. By not applying that logic to the case at bar, the Seventh Circuit has chosen to interpret reasonable attorneys fees under ERISA actions differently that under age discrimination actions. The court went on to say: "Our recent cases have stressed that the best measure of the cost of an attorney's time is what that attorney could earn from paying clients. For a busy attorney, this is the standard hourly rate. If he were not representing this plaintiff in this case, the lawyer could sell the same time to someone else." Id. at 1150.

The Fund financially supports its legal department just as it supports its other departments. To the extent that the Fund receives income in the form of fee awards, the amount that the Fund has to pay to its legal department from its general revenues is reduced. The Fund thereby directly benefits in every action filed from the award of attorney fees in excess of its actual legal costs attributable to that case no matter how one packages it. Nothing in the record indicates to the contrary.

Even if the Fund had segregated its attorney fee awards for the exclusive use of its legal department through a separate legal fund, the Fund in general would still be benefitted by the Awards. In Devine v. National Treasury Employees Union, 805 F.2d 384 (Fed. Cir. 1986), the Federal Circuit Court held that even if a separate legal fund were established and that all litigation funds came from that fund, ethical problems would still exist because such a plan "would relieve the union *pro tanto* from the burden of financing its litigation activities by allocating funds from general revenues [and would allow] it to profit indirectly from that which it could not do directly." Id. at 388.

B. The Rule of the Seventh Circuit Perverts the Purpose of Section 1132(g) from the Protection of Rights Important to the Public to an Avenue for Windfall Gains in the Pursuit of Private Contractual Rights of a Wealthy Litigant.

If any intention of Congress can be presumed in passing the fee shifting provision of Section 1132(g), it would be to assure that rights that benefit the general public are being protected, and that the cost of litigation should not pose a barrier to protection of those rights. Neither of those goals are met by the decision of the Seventh Circuit.

This case deals with private contractual claims and a multi-billion dollar plaintiff. In deviating from the American rule[11] that each litigant bears the cost of its own counsel, Congress must be presumed have intended to remove legal fees as a barrier to the "little guy" who is forced to demand his ERISA rights in court and/or to encourage litigation. That "little guy" is an employee/retiree participant. It was surely not the intention of Congress to reward multi-state, multi-billion dollar Taft-Hartley funds with a windfall measure of damages not found within the substantive provisions of ERISA.

ERISA plan administrators have fiduciary duties to collect overdue payments from their contributing employers. Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985). The Fund admitted that it has a fiduciary obligation to collect unpaid contributions.[12] It is unreasonable for the Seventh Circuit to presume that Congress silently intended to further encourage litigation by awarding attorneys fee awards in excess of actual fees incurred. The Seventh Circuit has interpreted Section 1132 as repealing the over two hundred year old American rule of attorneys fees. There is no other explanation of the decision below because: (1) No rights important to the public were being protected -- only private rights under a contract; (2) No financial support of litigation was necessary to protect those

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[11] The American rule was supposedly established in Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). Dobbs, Awarding Attorney Fees Against Adversaries: Introducing the Problem, 1986 Duke L.J. 435. *See* Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW AND CONTEMPORARY PROBLEMS , Winter 1984, at 9, 15.

[12] The Fund admitted in Appellees' brief in the Mason & Dixon Case that " . . . Central States is required by law to pursue delinquent contributions and there is a compelling public interest in encouraging this type of litigation." Appellees' brief, p. 22.

rights -- the plaintiff has more cash flow than most nationally known corporations; and (3) No encouragement of legal talent otherwise unattainable was required -- the plaintiff has a staff of full time attorneys.

There is no justification for allowing the Fund to charge Petitioners more money for the services of its staff attorneys than it actually paid for those services. The Seventh Circuit found that the Fund and its staff attorneys should be recompensed for the lost opportunity to do something else they might have done if they had not been engaged in litigation enforcing Petitioners' obligations to the Fund. There is nothing in the record to suggest that staff attorneys would have been earning market rate attorney fees in some other endeavor if they had not been engaged in this litigation. There is nothing in the record to suggest that if the Fund and its staff attorneys had not been engaged in enforcement litigation against Petitioners, they would not have been engaged in similar enforcement litigation against some other employer contributing to the Fund.[13]

The Fund, in setting the salary for its in-house staff attorneys, has made an actual, real-world determination concerning the value of their services. The Fund may decide to

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[13] In addition, there is nothing in the record to suggest that the Fund does not take into account the cost of its legal department and all of their activities when budgeting for the cost of operations of the Fund. Presumably, the entire amount of the Award is profit to the Fund because the actual cost of its staff attorneys is factored into the amount of contributions made by its contributing employers. The Seventh Circuit makes Petitioners pay for the legal fees of the Fund more than twice! Once, by payment through the amount of its contributions; second by the award of attorneys fees; and again by the difference between the salary of the staff attorneys and the amount of the Award. That result has no statutory language or legislative history to support it and no logic to recommend it.

raise or lower those salaries according to the value it receives from its attorneys. Likewise, the Fund's attorneys are free to seek alternative employment should they decide that their compensation is inadequate or that their services are undervalued.

The Fund and its staff attorneys agreed upon salaries to realistically reflect the value of their individual services. The Fund did not present evidence in either action concerning the costs it actually incurred or the rate at which it compensated its attorneys. The only evidence the Fund produced was through affidavits of its own attorneys setting forth the "market rates" for those services in the Chicago area. If the Fund had disclosed the salaries of its attorneys, there would have been no need to estimate the workings of a hypothetical market.[14] The court could simply use the hourly rate the Fund pays its attorneys for their regular legal services. Instead, the court relied upon Textor v. Board of Regents of Northern Illinois University, 711 F.2d 1387 (7th Cir. 1983) which dealt with an assessment of damages against an attorney guilty of bad faith litigation. In the cases at bar, the Seventh Circuit has now made that measure of award a "per se" damage award.

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[14] This Court noted in Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984), that the concept of a single market for attorney fees abstracts from reality, and constraints of fee negotiation which apply to fees in the ordinary attorney-client context are neither present nor compensated for in court ordered fee award determinations.

II.

A WRIT SHOULD BE GRANTED BECAUSE THE RULE OF THE SEVENTH CIRCUIT WILL INEXORABLY LEAD TO RESULTS NOT INTENDED BY CONGRESS AND BECAUSE THE RULE EXTENDS BLUM V. STENSON INTO AREAS NOT INTENDED BY THIS COURT

The decision of the Seventh Circuit will exorably lead to results not intended by Congress, including non-lawyer fee splitting, ambulance chasing, champerty through use of pre-paid legal services programs and in-house staff attorneys, aggressive pursuit of private contractual rights rather than protection of rights beneficial to the public, pressure to reach resolution through litigation rather than informal resolution or settlement, and federal district court forum shopping.

1. The Rule of the Seventh Circuit Will Lead to Non-Lawyer Fee Splitting and the Danger of "Ambulance Chasing".

The Seventh Circuit suggests that there is no fee splitting because the attorneys fees were awarded directly to the Fund and not to attorneys for payment over to the Fund. That is at best sophistry. The Award represents the payment for attorneys' work at attorneys' market rate fees. If the Award were measured by the amount of cost to the Fund in employing its staff attorneys, then an argument could be made that the Fund is only receiving reimbursement of its legal expenses. That would presumably be true whether the Award were being made directly to the Fund or to the staff attorneys and then credited against the salary owed to them by the Fund as employees.

Laymen are traditionally prohibited[15] from receiving a portion of an attorney's fee for bringing lawsuits or referring potential clients to an attorney.[16] That tradition has much to recommend it. The "ambulance" chasing and "disaster" chasing that lax enforcement of bar association and state legislative restrictions on such practices allowed led to champerty and the proliferation of litigation brought simply for the value of a nuisance settlement.

The Seventh Circuit measure of market rate attorneys fees for in-house attorneys, condones the professional practice

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[15] Simon, Fee Sharing Between Lawyers and Public Interest Groups, 98 Yale L.J. 1069, 1071 (1989).

[16] See American Bar Ass'n Code of Professional Responsibility, Disciplinary Rule ("DR") 3-102 and ABA Model Rule of Professional Conduct 5.4. The ABA Model Code of Professional Responsibility, Disciplinary Rule 3-102 provides:

> (A) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> (1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.
>
> (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
>
> (3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

ABA Model Rule of Professional Conduct 5.4(a) is virtually identical.

of law for profit by lay organizations.[17] In Anderson v. Department of Treasury, the Circuit Court for the District of Columbia awarded the actual cost to the litigant of its pre-paid legal services rather than market rate fees because the litigation under the federal Privacy Act was to protect rights of the private litigant rather than benefits to the general public. The Court stated that:

> It is our view that the award must go to counsel rather than to the organizations which pay their salaries. This is sound, whether such organization is a litigating party or a public interest law firm or defense fund. This procedure avoids all problems of whether the organization might, by receiving an award directly, be involved in the unauthorized practice of law.

Anderson v. Department of Treasury, 648 F.2d 1, 3 (D.C. Cir. 1979) *citing* Wilderness Soc'y v. Morton, 495 F.2d 1026, 1037 (D.C. Cir. 1974) (en banc), *rev'd on other grounds sub nom.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Accord, NTEU v. Nixon, 521 F.2d 317, 322 (D.C. Cir. 1975).

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[17] The argument of the Fund that the ABA would not be concerned about the Fund collecting attorneys fees is based on the argument that the Fund is a "not for profit" organization. Nonsense. The Fund is big business. The Fund attempted to argue to the Seventh Circuit in the Mason & Dixon Case that the Fund is a pro bono legal fund: "Although Formal Opinion 93-374 deals with non-profit pro bono organizations, its reasoning is fully applicable here since Central States' attorneys have no expectancy in the fee award and are not economically dependent upon it." Appellees' brief, p. 26.

The Seventh Circuit's interpretation of Section 1132(g) gave the Fund a reason to precipitously file its complaint. Once the Fund is in litigation, it can receive an award of attorneys fees greater than the actual cost to the Fund of its staff attorneys. Why negotiate at your own cost when you can file a complaint and make a profit on the fees of your lawyer?

2. The Rule of the Seventh Circuit Will Lead to the Creation of Large In-house Legal Staffs for Plaintiffs Litigation as a Profit Center by Non-Lawyers and Increased Litigation in Pursuit of Fees.

Any lay organization which can sue under one of the numerous fee shifting statutes can become a profit center for legal services by hiring in-house counsel and then profiting by the difference between the salaries of such counsel and the award of market rate attorneys fees by the court. That would encourage lay organizations to hire in-house counsel to commence litigation as profit centers for the general coffers of the organization. An article in the 1989 Yale Law Journal reported that many public service organizations do not currently have in-house attorneys.[18] In fact, that article reported that in 1987 and 1988 only 50% of all state American Civil Liberties Union affiliates and only 15% of other public interest groups did so.[19] The award of market rate fees as a matter of course can be expected to produce increased creation of in-house staffs and resultant increased litigation.

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[18] Simon, Fee Sharing Between Lawyers and Public Interest Groups, 98 Yale L.J. 1069 (1989).

[19] Simon, at p. 1069, 1071 nn. 3 & 6.

The Fund asserted in the court below that the cost of operating its legal department was $2,288,073.00 annually.[20] That cost is paid for as part of the overhead required to operate the Fund as a business entity. In turn, the contributing employers ultimately pay for those legal costs. Actuaries at the Fund consider the overhead burden of operating the Fund, including its legal department, when determining the contribution the participating employers must make on behalf of the employee participant/beneficiaries of the Fund.

Accordingly, when the Fund is awarded attorneys fees in excess of its actual cost of providing those legal services, the Fund receives attorneys fees directly, measured by the market rate for the location of the litigation.

The Seventh Circuit Rule encourages the Fund to: (1) Use in-house counsel to litigate cases of questionable merit because the Fund is only risking the salaries of its in-house attorneys which it is paying for anyway, for the opportunity to receive a greater award of market rate attorneys fees; and (2) churn or at least inefficiently manage its files because there is no incentive to avoid or resolve litigation.

3. The Interpretation of Section 1132(g) is a Radical Departure from the American Rule of Attorneys Fees.

The Rule of the Seventh Circuit improperly makes the award of attorneys fees a penalty. Section 1132(g)(1) contains no penalty provisions whatsoever. Section 1132(g)(2)(D)

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[20] In its Appellee's Brief to the Seventh Circuit, the Fund admitted that part of the award will help to alleviate the charge of legal services to the general fund of the Fund: "[T]he cost of operating Central States' law department exceeds the fees it recovers so Central States does not derive a profit from the activities of its attorneys." Appellee's brief, p.8.

contains penalty provisions for interest, but Section 1132(g)(2)(C) does not contain penalty provisions for fees. In those cases in which attorneys fees are awarded under Section 1132(g)(2)(C) at a market rate of interest, the Seventh Circuit will have increased the measure of the penalty legislated by Congress under Section 1132(g)(2)(C) by an inflated measure of attorneys fees under Section 1132(g)(2)(D). If Congress had intended to increase its measure of damages by the calculation of attorney fees at more than cost, it would have done so as clearly as it set forth the penalty measure of interest and liquidated damages in Section 1132(g)(2)(C).

In awarding attorneys fees to the Fund, despite the lack of public rights at issue, despite the lack of need to strike down financial barriers to litigation and despite the fact that the litigation was performed for substantially less cost to the Fund than the award of attorneys fees, the Seventh Circuit instructed the district courts in its circuit to reward unnecessary litigation with windfall damages and turn the statutory exception to the American rule of attorneys fees found in Section 1132 into a repeal of the American rule.

The Civil Rights Act award of market rate rather than actual fees represents a clear Congressional intention to encourage enforcement of the Civil Rights Act by private counsel acting as "private attorneys general". That reasoning has no application to the case at bar because the Fund admits that it has a fiduciary duty to enforce its fund instruments by litigation. Whether the Fund is awarded attorneys fees at market rates, fees at actual out of pocket costs or no fees at all, the fiduciary obligation of the Fund to litigate cannot be altered.

4. The Rule of the Seventh Circuit Discourages Informal Resolution between the Parties.

The Fund can fulfill its fiduciary obligation by informal resolution as well as by litigation. Informal resolution is always to be encouraged where possible to avoid unnecessary burdens on the federal judiciary. The Rule of the Seventh Circuit encourages litigation rather than non-judicial resolution by the Fund and the participating employer. If the Fund seeks informal resolution with the contributing employer without resort to litigation, the Fund will be forced to pay the salaries of its staff attorneys and will forego the opportunity to receive a windfall in the form of an award of market rate attorneys fees. On the other hand, if the Fund files a complaint in a Seventh Circuit district court under ERISA at the slightest provocation, each hour spent by its staff attorneys will be paid to the Fund in the form of a fee award.

That is true under the Seventh Circuit Rule whether or not the contributing employer is ultimately found liable to the Fund. In fact, in the case before this Court, the Fund concluded that Mason & Dixon had fully paid all contributions required of it. But the Fund also did not hesitate to commence its litigation and seek an award of market rate attorneys fees, far in excess of the actual costs incurred by the Fund.

If any intention of Congress may be presumed to have motivated the fee shifting provision of Section 1132(g), that presumption would be that Congress wanted to assure that the cost of litigation would not be a barrier to an employee asserting his rights under ERISA, rather than to reward multi-state, multi-billion dollar Taft-Hartley funds with an additional measure of damages not found within the substantive provisions of ERISA. In Anderson v. Department of Treasury, 648 F.2d 1 (D.C. Cir. 1979), the D.C. Circuit noted that the federal

Privacy Act, which has an attorney fee shifting provision, was not to reward the successful litigant, but rather to insure that the costs of litigation do not present a barrier to average citizens seeking to secure their private information. In Anderson, the court awarded the actual costs of plaintiff's pre-paid legal services rather than market rate fees because the rights being litigated, while important rights, were rights of the private litigant, rather than a guarantee of benefits to the general public.

5. The Rule of the Seventh Circuit Encourages Forum Shopping.

The "market" for determination of market rate fees is the locale of the litigation. If the plaintiff is represented by in-house counsel or pre-paid legal services, there will be an incentive to commence the litigation in an expensive, big city market. The actual cost to the plaintiff will be the same whether the lawsuit is brought in Chicago or Greenville, Tennessee, but the measure of fictitious "market rate" fees will be substantially different. The result is uneven justice dependent on the location of the litigation--both geographically and by population density, *i.e.*, big city versus small town. There is nothing to suggest that Congress intended to design such an unsettled scheme.

6. The Rule of the Seventh Circuit Changes the Possibility of Settlement of Litigation.

The potential award of a large amount of money dramatically changes the psychology of settlement and increases the incentive to institute and continue needless litigation while shifting the expenses onto the opponent. See generally Krent, Explaining One-Way Fee Shifting, 79 Virginia L.Rev. 2039, 2076 (1993). Some may argue that settlements become more difficult as the potential award of attorneys fees increases (the amount that one party will willingly accept and the other will

willingly pay may become further apart). Others may argue that the fear of an potential taxation of market rate attorneys fees against a litigant will encourage settlement to avoid a potential penalty. But all can agree that the potential award of attorneys fees which can be awarded to either plaintiff or defendant and apparently regardless of the outcome of the litigation, places both parties at jeopardy and adds an additional major point of disagreement between the parties.

The Mason & Dixon Case is a prime example of fee awards extending litigation. The Fund kept the district court case pending for several months after the audit had commenced. Rather than dismiss the action and institute another suit if the audit uncovered delinquent contributions, the Fund kept the suit pending while assuring the district court that it would amend its complaint after completion of the Audit. In fact, the Audit concluded that Mason & Dixon had paid all contributions required of it and the Fund never amended its complaint to seek further contributions. Nonetheless, the Fund claimed entitlement to more than $20,000 in attorneys fees, part of which were incurred after the commencement of the audit. In fact, the district court in the Mason & Dixon Case noted that

> 20,000 plus dollars in fees where the audit apparently did not reveal any delinquencies, or at least did not require plaintiffs to amend their complaint to pursue delinquent contributions, seems facially incongruous.

Appendix A at page 5. Nonetheless, the Fund was rewarded by an Award based on market rate fees.

The federal judiciary has traditionally encouraged resolution by the litigants without intervention by the court. The Seventh Circuit Rule works contrary to resolution by

compromise of the parties. If the fear of a potential taxation of fees forces settlement, the parties will have been cajoled into resolution rather than being encouraged to have meaningful discourse with the opposing litigant.

7. The Rule of the Seventh Circuit Will Encourage Plaintiffs with Pre-paid Legal Programs to Commence Litigation in Search of a Fee Award.

The Seventh Circuit's decision encourages individuals participating in pre-paid legal programs to file litigation in search of fee awards whether the award would go to the plaintiff or plaintiff's attorney. If a plaintiff enjoys pre-paid legal services, provided, for example, by his union, the award of attorneys fees to the plaintiff will be a "reimbursement" of a cost which he never incurs. If the award is to the union (or other sponsor) of the pre-paid plan, staff lawyers have an incentive to ferret out potential plaintiffs to create market rate attorneys fees awards for the benefit of the sponsor. The result is that litigation is encouraged for the purpose of the fee award rather than protection of individual rights of the plaintiff.

8. The Seventh Circuit Rule Sharing Above-Cost Fees with a Lay Organization Violates the Ethical Rules of the Illinois Bar Association.

The Fund is administered in Illinois, and its attorneys are members of the State Bar of Illinois. Illinois ethical rules are binding on the Fund's attorneys in federal as well as state courts.[21] The Illinois Rules of Professional Conduct ("RPC")

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[21] The disciplinary rules of the State Bar of Illinois are applicable to fee awards made by federal courts. In re Continental Securities litigation, 750 F. Supp. 868, 891 (N.D. Ill. 1990) *citing* Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1322 (7th Cir. 1974). See RPC 8.5 (a lawyer admitted

prohibit a lawyer or law firm from sharing legal fees with a nonlawyer. RPC 5.4, like the American Bar Association Model Code and Model Rules, prohibits a lawyer or law firm from sharing fees with a nonlawyer.[22]

The Illinois State Bar Association's ("ISBA") Committee on Professional Ethics (the "Committee") has published a number of opinions on the ethical implications of splitting fees:[23] (1) ISBA Opinion No. 123, construing DR 3-102: any division of fees with a collection agency or any lay agency is unethical;[24] (2) ISBA Opinion No. 90-20: an attorney employed by a lay organization may not share fees with the employer;[25] (3) ISBA Opinion No. 92-24: an attorney may not

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to practice in Illinois is subject to the state bar's disciplinary authority although engaged in practice elsewhere).

[22] See Comment to RPC 5.4, Illinois Rules of Professional Conduct. Exceptions are made for certain cases involving the death of a lawyer or in the context of compensation or retirement plan for nonlawyer employees.

[23] ISBA Advisory Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials. ISBA Opinions do not have the weight of law and are provided herein as persuasive authority only.

[24] In a similar context, the ABA held that it is improper for an organization to be paid a fee for the legal services performed by the organization's lawyer. See ABA Informal Opinion No. 1181. Likewise, in Informal Opinion No. 359, the ABA stated that a lawyer devoting his entire time to one client for an agreed salary may not ethically turn over fees to his employer as a set off to the expense of maintaining its legal department.

[25] The employer had solicited Illinois consumers to purchase revocable living trusts. The attorney was to review or prepare the documents to make sure they complied with Illinois law. The employer would then charge for furnishing the revocable trust. The Committee concluded that because the employer would be paid directly for the trust, would keep a portion of the fee,

share fees with a non-attorney, even in the form of a charitable contribution.[26]

The collection of the Award in excess of the Fund's actual expenditures constitutes a profit to the Fund in violation of RPC 5.4 and the long-standing prohibition against lawyers sharing fees with nonlawyers.

CONCLUSION

Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

Patrick A. Moran*

EVANS & LUPTAK, P.L.C.
2500 Buhl Building
Detroit, Michigan 48226
Telephone: (313) 963-9625
Attorneys for Petitioners

*Counsel of Record

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and then provide payment to the attorney, the arrangement violated RPC 5.4(a).

[26] A law firm had proposed to offer prospective clients that 5% of its fees would be donated to a charity of the client's choice. The Committee objected to the arrangement, holding that there were "three, and only three" exceptions to the prohibition of sharing fees with nonlawyers or lay organizations. The Committee noted that the Illinois Supreme Court had the opportunity to limit the reading of this rule in a number of cases but has refused to do so. Moreover, the Committee noted that a previous opinion disapproved of allowing an attorney to rebate a small percentage of his fees to an organization as a service fee.

APPENDIX

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APPENDIX A

Transcript of Proceedings before the Honorable David H. Coar and Judgment Issued March 21, 1995

Appendix A

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CENTRAL STATES,
SOUTHEAST AND
SOUTHWEST AREAS
PENSION FUND, and
HOWARD MCDOUGALL,
trustee,

Plaintiffs,

v.

THE MASON AND DIXON
LINES, INC.,

Defendant.

No. 93 C 7497

Chicago, Illinois
March 21, 1995
9:30 a.m.
Ruling

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID H. COAR

Appendix A

APPEARANCES:

For the Plaintiffs: CENTRAL STATES SE & SW AREAS HEALTH & WELFARE & PENSION FUNDS
9377 West Higgins Road
Rosemont, Illinois 60018-4938
BY: MR. ROBERT A. COCO

For the Defendant: MASON AND DIXON LINES, INC.
2500 Buhl Building
Detroit, Michigan 48226
BY: MR. ERIC A. PARZIANELLO

TRACEY D. McCULLOUGH, CSR, RPR
Official Court Reporter
219 South Dearborn Street, Suite 1420
Chicago, Illinois 60604
(312) 922-3716

Appendix A

THE CLERK: Are the parties here for Central States versus the Mason and Dixon Line?

MR. COCO: Yes, we are.

THE CLERK: You're both here?

MR. COCO: Yes.

THE CLERK: 93 C 7497.

MR. COCO: Good morning, Your Honor. Robert Coco appearing on behalf of the plaintiffs

MR. PARZIANELLO: Eric Parzianello, Your Honor, on behalf of the defendant.

THE COURT: We have got the motion for reconsideration and on the set call the motion for award of attorney's fees. I'm going to do this by oral findings of fact and conclusions of law.

This case is before the Court this morning on several matters, all of which relate to the defendant's motion to reconsider and the plaintiffs' motion for award of attorney's fees and costs and as amended by Robert Coco's affidavit dated March 10, 1995.

As the parties are well aware, Judge Leinenweber entered an oral ruling on April 28, 1994, in which he ordered the defendant, The Mason & Dixon Lines, Inc., to provide plaintiffs Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall access to all records they needed to audit the contributions defendant made to the pension fund.

Judge Leinenweber concluded that defendant violated the terms of the trust agreement between the parties when it failed to provide promptly the information requested by the plaintiffs. Judge Leinenweber also noted that defendant had failed to respond to certain requests for information by plaintiffs and that when it did reply to these requests, defendant's explanation for its tardiness was wanting.

For these reasons Judge Leinenweber held that the plaintiffs were entitled to recover their reasonable attorney's fees incurred in bringing the present action pursuant to Section 502 of ERISA. Judge Leinenweber further held that plaintiffs must bear the costs they would ordinarily incur in auditing defendant. Plaintiffs have recently completed the audit of defendant's records.

At the conclusion of their audit plaintiffs filed a motion for attorney's fees and costs. This filing prompted defendant to file a motion to reconsider Judge Leinenweber's April 29, 1994 award of attorney's fees, a motion which the defendant has finally presented today. I am troubled by the defendant's decision to proceed with this belated motion for reconsideration because it merely rehashes the very arguments that Judge Leinenweber considered and rejected nearly 11 months ago.

Moreover, defendant's failure to comply with Judge Leinenweber's order to produce the records until after plaintiffs proceeded with a rule to show cause on August 9, 1994, certainly raises questions about defendants purported willingness to cooperate in the audit. Under these circumstances it appears to me that the defendant has engaged in forum shopping in the unrealistic hope that I, the judge to whom the case was reassigned, would reverse Judge Leinenweber's decision. I decline to do so.

The defendant has not demonstrated that Judge Leinenweber's ruling contained manifest errors of law or facts and the defendant did not file a motion to present newly discovered evidence to the Court. The motion for reconsideration is denied on its merits. Plaintiffs' motion to strike defendant's motion for reconsideration is denied as moot.

Plaintiffs seek to recover $20,075 in fees and $593.68 in litigation costs. This work represents 150.40 hours of work performed by three in-house attorneys for Central States,

Southeast and Southwest Areas Pension Fund; namely, Robert A. Coco, Albert M. Madden, and Thomas J. Weithers, and a paralegal, Bonnie L. Payne. The defendant has challenged both the amount of each attorney's hourly fee and the number of hours worked.

With respect to the amount of the hourly fee, defendant contends that plaintiffs are only entitled to recover the fees they incurred as determined by a cost based analysis of what it actually expended on this litigation; that is, salaries paid plus a percentage of overhead. I disagree. Plaintiffs are entitled to their fees at market rate as recognized by the Seventh Circuit in Textor v. Board of Regents of Northern Illinois University, 711 F.2d, 1387, at 1396 to 97.

Moreover, the market rate properly represents the amount of fees incurred by plaintiffs since "for every hour in-house counsel spent on this case, they lost an hour of legal services that could have spent on other matters." Also citing from the Textor case at 1397.

I, therefore, find the hourly rates charged by the plaintiffs reasonable and commensurate with the prevailing market rates for attorneys of similar practice and experience. I, nevertheless, share defendant's concerns about the total amount of the fees and the number of hours involved. 20,000 plus dollars in fees where the audit apparently did not reveal any deficiencies, or at least did not require plaintiffs to amend their complaint to pursue delinquent contributions, seems facially incongruous.

But as plaintiffs argue, this was a contested case. My concern with the number of hours billed does not arise from the contentious nature of this litigation, but rather from the rather routine nature of the lawsuit.

Plaintiffs frequently file complaints for audits and are thus presumably well versed in the governing body of law.

Appendix A

Plaintiffs spent a combined 62 and 6/10ths hours plus 2 and a half paralegal hours between January 27, 1994, and March 30, 1994, preparing a 12 (m) statement of uncontested facts, an eight-page memorandum in support of its motion for summary judgment, a response to defendant's 12 (m) statement of contested facts, and a consolidated response memorandum to defendant's cross motion for summary judgment and reply in support of plaintiffs' partial motion for summary judgment.

Defendant has requested that this amount be reduced by one half. Based on my own review of the pleadings, I believe that 50 hours of attorney's time would be a reasonable amount of time for this work. Since Attorneys Coco and Madden billed approximately the same amount of hours on these projects, I have reduced their respective hours totals by 6 and 3/10ths hours each.

Accordingly, I have deducted $787.50, 6.3 times 125, to account for Mr. Coco's reduced hours and $945, 6.3 times $150 per hour, to account for Mr. Madden's reduced hours. I have also deducted $150 for the 2.5 hours spent by the paralegal.

With respect to the time period of recoverable fees, the plaintiffs are entitled to recover only those fees which they incurred relating to the lawsuit and defendant's submission to an audit. Once the audit began, plaintiffs should not be able to recover any fees from monitoring the progress of the audit for the simple reason that plaintiffs would have incurred these expenses regardless of whether this lawsuit was filed or not.

Accordingly, after September 8, 1994, I have deducted time billed from monitoring the audit; however, I have not made any adjustments for time billed for discovery matters and further pleadings. For example, responding to a motion for reconsideration, et cetera.

Appendix A

Since plaintiffs' descriptions of the work performed are often cryptic, I have deducted the time billed for any entry that could reasonably be interpreted as relating to monitoring the progress of the audit. I have made the following deductions from the attorney's fee petition:

5.1 hours from Mr. Coco's time, or the sum of $637.50; 4.2 hours from Mr. Madden's time, or the sum of $630; and 0.2 hours of paralegal time, or the sum of $12. I find the remainder of the fees to be reasonable, and accordingly award plaintiffs the sum of $16,913.

Finally, with respect to litigation costs, plaintiffs are entitled to recover their filing, process, and related miscellaneous expenses. Plaintiffs are not entitled to recover their Westlaw charges. Plaintiffs have failed both to identify the nature of the Westlaw research or explain its necessity. Defendants should not have to pay for plaintiffs' decision to conduct electronic research when other less expensive research resources were readily available. I, therefore, award plaintiffs the sum of $220.48 for expenses.

It is therefore ordered, adjudged, and decreed that judgment is entered in favor of plaintiffs Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall, and against defendant The Mason and Dixon Lines, Inc., in the total amount of $17,133.48.

For the reasons stated on the record an order will be entered in accordance with the findings and conclusions just indicated.

MR. COCO: I just have two questions, Your Honor.

THE COURT: Yes.

MR. COCO: One, will a written copy of your order be available?

THE COURT: No, sir. You have to order a transcript.

MR. COCO: Okay. And secondly, may we submit a draft order to chambers?

THE COURT: That will be fine.

MR. COCO: And I will provide opposing counsel with a draft.

MR. PARZIANELLO: And that will also include dismissing the case?

MR. COCO: Correct. Thank you very much.

MR. PARZIANELLO: Thank you, Judge.

MR. COCO: Do you want that to chambers or to your minute clerk?

THE COURT: Chambers, please.

MR. COCO: Thank you.

Appendix A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

Central States Southeast and
Southwest Areas Pension Fund, et al.
Plaintiff,

JUDGMENT IN A CIVIL CASE

v.

The Mason & Dixon Lines, Inc.
Defendant.

CASE NUMBER:
93 C 7497

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT THE Defendant's Motion for Reconsideration is DENIED. JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANT in the amount of $17,133.48.

March 29, 1995, nunc pro tunc March 21, 1995
Date

H. STUART CUNNINGHAM
Clerk

Patricia McQurter-Figgs
(By) Deputy Clerk

APPENDIX B

Order and Judgment of Seventh Circuit Court of Appeals--Without Oral Argument in the Mason & Dixon Case Issued on February 7, 1996

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 29, 1996
February 7, 1996.

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD MCDOUGALL, Trustee, Plaintiffs-Appellees, No. 95-2026 v. THE MASON & DIXON LINES, INC. Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 93 C 7497 David H. Coar, *Judge*

ORDER

On the authority of *Central States Pension Fund v. Central Cartage Co.*, No. 94-3823 (7th Cir. Jan. 22, 1996), the award of attorneys' fees is affirmed. Because §502(g)(2)(D) of ERISA, 29 U.S.C. §1132(g)(2)(D) is a fee-shifting statute, the Pension Fund is entitled to an award of fees for the time reasonably incurred in defending the district court's award. See *Commissioner of INS v. Jean*, 496 U.S. 154 (1990) (so holding

for the Equal Access to Justice Act, the model for the fee-shifting provision in ERISA). It should submit an appropriate statement within 14 days.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITHOUT ORAL ARGUMENT

Dated: February 7, 1996

BEFORE: **Honorable** JOHN L. COFFEY, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

No. 95-2026

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD MCDOUGALL, Trustee,

Plaintiffs-Appellees,

v.

MASON & DIXON LINES, INCORPORATED, a Delaware corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 93 C 7497, David H. Coar, Judge

APPENDIX B

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C

Opinion on Motion for Attorneys Fees by Seventh Circuit Court of Appeals in the Cartage Case Issued January 22, 1996

Appendix C

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al., Plaintiffs-Appellees,
v.
CENTRAL CARTAGE COMPANY and CENTRAL TRANSPORT, INC., Defendants-Appellants.

Nos. 94-3823, 95-1872, 95-1976

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

January 22, 1996, Decided

JUDGES: Before FLAUM, EASTERBROOK, and DIANE P. WOOD, Circuit Judges.

OPINION BY: EASTERBROOK

OPINION: On Motion for Attorneys' Fees.

EASTERBROOK, Circuit Judge. Following its victory on the merits of these appeals, see 69 F.3d 1312 (1995), the Central States Pension Fund requested an award of attorneys' fees under §502(g)(2)(D) of ERISA, 29 U.S.C. §1132(g)(2)(D). The district court awarded the Fund the fees incurred in that forum, concluding that the employers' position was not substantially justified, and the Fund submits that the appeal was no better justified. Central States Pension Fund v. Joe McClelland, Inc., 23 F.3d 1256 (7th Cir. 1994), supports that conclusion. See also Continental Can Co. v. Chicago Truck Drivers Pension Fund, 921 F.2d 126 (7th Cir. 1990). In Joe McClelland we ordered an employer that took a position similar to that of Central Cartage to pay the Fund's legal expenses. The

panel's inability to reach unanimous agreement about the best way to express the reason the employers lost should not disguise the fact that none of the judges thought the appeal "substantially justified." The Fund's motion therefore is granted.

What remains in dispute is the method of calculating the "reasonable attorney's fee" of which the statute speaks. The Fund is represented by staff counsel. Central Cartage insists that the award cannot exceed the Fund's out-of-pocket costs: the attorneys' salaries plus other actual expenses of its legal counsel's office. The Fund, by contrast, believes that it is entitled to recover the sum it would have paid had it hired outside counsel. The Fund relies on Blum v. Stenson, 465 U.S. 886, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984), which held that a litigant represented by a nonprofit legal aid society could recover fees computed at the market rate for similar legal work, even if that rate exceeded the salaries and expenses of staff counsel. The Court held in Blum that attorneys' fees statutes do not establish a version of cost-of-service ratemaking but look to market prices, which are set by voluntary transactions rather than the costs of production. Central Cartage wants us to put Blum aside in favor of Devine v. National Treasury Employees Union, 805 F.2d 384, 386-88 (Fed. Cir. 1986); Goodrich v. Department of the Navy, 733 F.2d 1578, 1580-81 (Fed. Cir. 1984), and National Treasury Employees Union v. Department of the Treasury, 211 U.S. App. D.C. 259, 656 F.2d 848, 850-53 (D.C. Cir. 1981), which adopted a cost-of-service approach to avoid any prospect that legal-fee awards would subsidize other aspects of the victor's business, something that these courts thought would conflict with the ethical principle that attorneys may not share their fees with nonlawyers. See ABA, Model Rules of Professional Conduct 5.4(a). (Central Cartage's papers in this case refer us to the employer's argument in a pending

appeal, Central States Pension Fund v. Mason & Dixon Lines, Inc., No. 95-2026, which has not yet been argued. Mason and Dixon Lines is a member of the same holding company structure as the employers in this case, so the briefs in that appeal, which we have read, contain full statements of our litigants' positions.)

Both of the Federal Circuit's decisions came after Blum, which that court distinguished on the ground that an award to a legal-services organization poses no risk of fee splitting with nonlawyers. An award to a union (or presumably to a pension trust) may well provide such benefits. The Federal Circuit suggested that things might be otherwise if the union had a separate legal-services fund, which would be the recipient of any award. Devine, 805 F.2d at 388-89; Goodrich, 733 F.2d at 1581. Many organizations took the cue and established such funds. The D.C. Circuit--the author of the first case in this sequence--has held that a separate legal-services fund within a union may recover fees at the market rate, just like the legal services organization in Blum. See American Federation of Government Employees v. FLRA, 292 U.S. App. D.C. 1, 944 F.2d 922, 934-38 (D.C. Cir. 1991). Accord, Curran v. Department of the Treasury, 805 F.2d 1406 (9th Cir. 1986). This may be a sound distinction, but Central Cartage encounters a deeper problem. Cases such as Devine and Goodrich have never represented the law in this circuit. We have twice held that organizations that include both lawyers and nonlawyers may recover fees at the market rate, whether they obtain legal services by the hour in a spot market or by the year through employment contracts. See Textor v. Northern Illinois University, 711 F.2d 1387, 1396-97 (7th Cir. 1983); Illinois v. Sangamo Construction Co., 657 F.2d 855 (7th Cir. 1981).

Appendix C

Whatever one can say about the policy behind the rule against fee-splitting, or the policy behind the rule permitting the recovery of fees, or the effect of a separate legal-costs fund, is beside the point. Most fee-shifting statutes, including ERISA, direct the award to the litigant rather than the lawyer. The litigant may compromise the claim over the lawyer's objection, or may elect not to petition for fees. See Venegas v. Mitchell, 495 U.S. 82, 109 L. Ed. 2d 74, 110 S. Ct. 1679 (1990); Evans v. Jeff D., 475 U.S. 717, 730, 89 L. Ed. 2d 747, 106 S. Ct. 1531 (1986); Zeisler v. Neese, 24 F.3d 1000 (7th Cir. 1994). The Court wrote in Venegas, 495 U.S. at 87-88: "Because it is the party, rather than the lawyer, who is so eligible, we have consistently held that fees may be awarded . . . even to those plaintiffs who did not need them to maintain their litigation, either because they were fortunate enough to be able to retain counsel on a fee-paying basis [citation omitted] or because they were represented free of charge by nonprofit legal aid organizations [citing Blum]." If the victorious litigant owns the money representing the market value of the legal fees, and may pocket the cash without remitting a cent to the lawyer--who may have agreed to work for less, or for free--it is hard to see how there can be a fee-splitting objection. The money is not the lawyer's to start with. A contract between lawyer and client may call for a particular distribution, may even assign the award to the lawyer, but how the litigant allocates the money between its legal budget and other endeavors is none of the court's business (provided it keeps its contracts). It is similarly irrelevant whether the award is based on a fee-shifting statute such as §502(g)(2)(D) or a penalty provision such as Fed. R. Civ. P. 11; the litigant owns the award in either case, which overcomes all fee splitting objections.

Appendix C

Devine, Goodrich, and NTEU v. Department of the Treasury disregard the principle that the litigant owns the award, and we decline to follow them. The market rate standard of Blum controls. And the market rate, as Blum held, is the price similar services fetch when sold by the hour in transactions between solvent parties. So, for example, work by a law firm's associates for which clients will pay $ 125 per hour has a market value of $ 125 per hour, even if the law firm pays the associates only $ 75 per hour and distributes the rest to the partners as profit, or to the landlord as rent. Just so, Blum held, with services furnished by house counsel who receive an annual salary. Looking to the price of actual transactions in the market avoids the need to determine the full cost of in-house services, which includes not only lawyers' salary and out-of-pocket expenses but also the opportunity cost of their time. Lawyers who devote their time to one case are unavailable for others, and in deciding whether it is prudent to pursue a given case a firm must decide whether the cost--including opportunities foregone in some other case, or the price of outside counsel to pursue that other case--is worthwhile. Opportunity cost, rather than cash outlay, is the right way to value legal services. E.g., Barrow v. Falck, 977 F.2d 1100, 1105 (7th Cir. 1992); In re Continental Illinois Securities Litigation, 962 F.2d 566, 568-69 (7th Cir. 1992). The going rate for comparable legal services in the market reveals that cost directly, avoiding a complex inquiry that is in the end likely to produce a comparable figure.

Central Cartage has one additional argument. It attributes to Gusman v. Unisys Corp., 986 F.2d 1146 (7th Cir. 1993), and Barrow v. Falck, supra, the principle that the hourly fee a lawyer charges to the client is "the" market rate for the legal services in question, and it asks us to treat the salary of in-house counsel as that market rate. If that is indeed what

Gusman and Barrow held, they would be in tension, if not conflict, with Blum. But it is not what our cases held. See Johnson v. Lafayette Fire Fighters Ass'n, 51 F.3d 726, 732 (7th Cir. 1995). We concluded that a lawyer's regular hourly fee, one counsel would charge "to the meanest villain", Barrow, 977 F.2d at 1106, is the market rate for that lawyer's services. In Barrow the union's lawyer had a low hourly rate for everything; that normal rate, we held, is the market rate. Gusman takes the same approach when the lawyer has a high hourly rate, which presumably reflects extra skills or productivity. Neither case questioned the holding of Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988) (en banc), that a litigant may recover fees measured by its attorney's usual hourly rate--the one solvent clients are willing to pay--even though the attorney has charged a lower fee in a particular case as a donation to the organization. That gift should enure to the intended recipient rather than to the adversary in litigation. See Barrow, 977 F.2d at 1105-06. Thus if the attorneys who work for the Central States Pension Fund are making it a gift by working for wages lower than those they could secure at large law firms, the value of that gift belongs to the Fund, which can capture it by an award of fees at market rates. The Fund pays the attorneys their salaries, and the bargain element goes toward the Fund's other operations. None of this reflects a belief that the Fund's attorneys are donating their services; for all we know, their pay is equal to what they could get in the corporate law departments of Central Transport and other employers. The point, rather, is that under Blum the wages of staff counsel do not matter; the court should make an award representing the cost the victorious litigant would have incurred to buy legal services in the market, no matter how the litigant actually acquired those services.

Appendix C

The Fund has 14 days to submit a statement of the market value of the legal services reasonably used in the course of this appeal. The employers have 14 days to respond, after which we will make an appropriate award.

APPENDIX D

29 U.S.C. §1132

Appendix D

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT
INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE
BENEFIT RIGHTS
SUBTITLE B--REGULATORY PROVISIONS
PART 5--ADMINISTRATION AND ENFORCEMENT

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Current through P.L. 104-113, approved 3-7-96

§1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate

equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this subtitle or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the

alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Refusal to supply requested information; failure to comply with notice requirements; penalties

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation. The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena [sic], or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

Appendix D

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Appendix D

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under

subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided

in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

(2)

No. 95-1812

Supreme Court, U.S.
FILED
JUN 6 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THE MASON & DIXON LINES, INC.,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

and

CENTRAL TRANSPORT, INC. and CENTRAL CARTAGE CO.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS C. NYHAN *
General Counsel
ALBERT M. MADDEN
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800
Attorneys for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether an attorney fee award at market rates to a litigant represented by in-house counsel constitutes fee sharing since the attorney never had a right to receive or exercise control over any part of the fee award.

2. Whether the market rate is the best measure of the value of the services of in-house counsel because unlike a cost based calculation, the market rate reimburses the prevailing party for the delay caused by devoting legal resources to a particular case instead of other legal matters and frees the courts from potentially complex, lengthy litigation over the allocation of operating costs to legal activities.

STATEMENT PURSUANT TO RULE 29(6)

None of the Respondents are corporations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1812

THE MASON & DIXON LINES, INC.,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

and

CENTRAL TRANSPORT, INC. and CENTRAL CARTAGE CO.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Central Cartage and Central Transport Litigation.

The Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund (collectively "Central States") sued Central Cartage Co. ("Cartage") and Central Transport, Inc. ("Transport") to collect delinquent fringe benefit contributions. After the district court granted Central States' summary judgment motion

against Cartage, *Central States Pension Fund v. Central Cartage Co.*, 861 F.Supp. 1402 (N.D. Ill. 1994), *aff'd sub nom.*, 69 F.3d 1312 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996), Central States requested an award of attorneys' fees pursuant to § 502(g)(2)(D) of ERISA. 29 U.S.C. § 1132(g)(2)(D). In an oral ruling on October 11, 1994, the district court rejected Cartage's contention that the award should be determined on a cost basis and awarded fees totaling $58,801.68 which were calculated at prevailing market rates. On February 17, 1995, the district court granted summary judgment in favor of Central States and against Transport. The district court subsequently awarded attorneys' fees against Transport totaling $24,312.56 which were calculated at market rates without any objection from Transport. Cartage and Transport filed separate appeals that were consolidated and, although they challenged the district court's ruling on the merits, neither Cartage nor Transport challenged the district court's fee awards.

After the court of appeals affirmed the judgments in favor of Central States, Central States moved for an award of appellate attorneys' fees. Transport and Cartage filed a joint response where they indicated that they "anticipate[d] that the fee petition which will be submitted by the Funds will seek compensation based upon an hourly market rate." Despite their failure to challenge the district court's market rate award in the court of appeals, Cartage and Transport argued that appellate fees should be calculated on a cost basis. They also indicated that the issue had already been fully briefed in the appeal of their corporate affiliate, The Mason and Dixon Lines, Inc. ("Mason"), and requested that the court of appeals suspend its ruling until the Mason appeal was decided.

On January 22, 1996, the court of appeals held that appellate fees should be awarded at market rates under *Blum v. Stenson*, 465 U.S. 886 (1984) and prior seventh circuit decisions. The seventh circuit recognized that two

circuits had held that *Blum* did not apply where the fee award was sought by a union rather than a non-profit legal service organization because the union could use the fee award to subsidize other aspects of its business which would create conflict with the ethical rule prohibiting attorneys from sharing their fees with non-lawyers. However, the seventh circuit concluded that there was no risk of fee sharing for two reasons. First, fee awards under ERISA belong to the litigant, not the attorney. Since the in-house attorney had no claim to the fees, all fee splitting objections were overcome.

Second, the court of appeals recognized that if a cost-based method was used, it would be necessary to not only consider attorney salary and overhead costs, but also to determine the opportunity cost to the prevailing party of using its lawyers on a particular case and either delaying other legal matters or hiring outside counsel to handle the other matters. The court of appeals believed that this "complex inquiry . . . [would] in the end likely . . . produce a comparable result [to selecting the market rate]." (Petitioners' App. p. 21a). Since the market rate calculation resulted in an award that was equal to the actual cost of in-house attorney services, the court concluded that a market rate fee award could not result in fee sharing with a client. On February 26, 1996, the court of appeals awarded appellate fees of $17,467.50 to Central States, which were calculated at what was agreed to be the market rate. (Respondents' App. 8a-9a).

B. Mason Litigation.

Central States brought suit under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), to force Mason to comply with its contractual duty under the Central States' trust agreement to provide access to its payroll records for an audit that would enable Central States to determine whether Mason had paid all required pension contributions. On April 28, 1994 the district court

granted Central States' summary judgment motion and denied Mason's cross motion. Although Mason claims in its petition that it agreed to submit to the audit, the district court found that "on some occasions defendant failed to respond to plaintiffs' requests for information [and] when defendant did reply . . . its explanations for the delay were inadequate" (Respondents' App. 3). As a result, the district court held that Mason breached the Central States' trust agreement requirement that Mason "promptly furnish to the Trustees upon reasonable demand" access to payroll records (Respondents' App. 2-3). The district court ordered Mason to cooperate with the audit "as soon as possible even if it must hire additional labor" to do so and ordered Mason to pay Central States' attorney's fees pursuant to § 502(g)(1) of ERISA, 29 U.S.C. § 1131(g)(1) (Respondents' App. 2).

Despite the court's order, Mason did not provide access to a single record until Central States filed a motion for rule to show cause which in the district court's view, "certainly raises questions about the defendants' purported willingness to cooperate with the audit." (Petitioners' App. p. 5a). There is nothing in the record with respect to the results of the audit so Mason's claim that the audit revealed no delinquency is unsupported (and is actually false).

On appeal, Mason did not challenge the determination that it had violated the trust agreement and it did not contest the number of hours of work included in the fee award or the rates the district court selected as the market rate. Mason's sole argument was that the district court's adoption of the market rate standard was improper. On February 7, 1996 the court of appeals affirmed the district court fee award "on the authority of *Central States Pension Fund v. Central Cartage Co.*, No. 94-3823 (7th Cir. Jan. 22, 1996)" and held that Central States was entitled to an award of appellate fees (Petitioners' App. p. 11a). On March 13, 1996, the court of appeals

awarded appellate attorneys fees totaling $10,707.07 (Respondents' App. 10-11).

REASONS FOR DENYING THE WRIT

Even if the holding challenged by the petitioners were erroneous, Cartage and Transport failed to challenge the district court's fee award at market rates. Since the district court's award is final, Cartage and Transport are barred from challenging the award of appellate fees at the market rate by the doctrines of issue preclusion and waiver. Because Mason is in privity with Cartage, it is also barred from litigating the issue. Thus, petitioners will lose in any event so the petition should be denied.

Further, the seventh circuit decision does not conflict with other circuits because the cases cited by petitioners are distinguishable for three reasons. First, the cases relied upon by petitioners involve fee awards in favor of non-party unions that represented members under prepaid legal service plans. However, the fee awards in these cases are in favor of the litigant so no part of the award belongs to the attorney and the fee is not split. Second, the unions seeking fees in the cases cited by petitioners failed to show that it was virtually impossible to calculate actual costs. On the other hand, Central States showed that market rates had to be used to reimburse the prevailing litigant for the opportunity cost of delaying other matters to handle a particular case and freed the district court from the lengthy complex task of determining what portion of a businesses operating expense should be allocated to its law department. Third, the cases cited by petitioners are distinguishable because they do not involve fee awards sought by non-profit entities under statutes designed to encourage private enforcement actions. Under the circumstances of this case, the decision in *Blum v. Stenson*, 465 U.S. 886 (1984) requires that fees be awarded at market rates.

I. EVEN IF THE COURT OF APPEALS DECISION IS INCORRECT, PETITIONERS WILL NOT PREVAIL BECAUSE THEY ARE BARRED FROM CHALLENGING THE MARKET RATE STANDARD BY THE DOCTRINES OF ISSUE PRECLUSION OR WAIVER.

Cartage did not contest the district court's market rate award on appeal and Transport did not object to the market rate in either the district court or court of appeals. As a result, Cartage and Transport will lose on the alternate grounds of issue preclusion and waiver even if this Court reversed the court of appeals. Since it is in privity with Transport and Cartage, Mason is also precluded from challenging the market rate calculation. Under similar circumstances this Court has observed:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. Resolution here of the * * * [issue in conflict among the circuits] can await a day when the issue is posed less abstractly.

The Monrosa v. Carbon Black, Inc., 359 U.S. 180, 184 (1959).

The doctrine of issue preclusion prevents a party from relitigating an issue that has been actually litigated and determined by a valid and final judgment. Restatement of Judgments § 27 (1982). When a party fails to timely appeal a district court determination, the doctrine of issue preclusion bars relitigation of the issue in subsequent proceedings in the same case. *Maggio v. Zeitz*, 333 U.S. 56, 68-70 (1948); *Avitia v. Metropolitan Club of Chicago, Inc.*, 924 F.2d 689 (7th Cir. 1991); *Sidney v. Zah*, 718 F.2d 1453 (9th Cir. 1983). The district court's adoption of the market rate standard was not appealed by Cartage or Transport so the determination became

final and the issue cannot be relitigated in the context of Central States' appellate fee request. Moreover, by failing to preserve the issue, Transport and Cartage waived their right to challenge their liability for appellate fees at market rates.

Since petitioners concede that Cartage and Mason are wholly owned subsidiaries of Centra, Inc. (Petition at p. ii), they are in privity for the purpose of issue preclusion. *Central Transport, Inc. v. Four Phase Systems, Inc.*, 936 F.2d 256 (6th Cir. 1991) (holding that subsidiaries of Centra, Inc. are in privity for issue preclusion purposes); *In re: Teltronics Service, Inc.*, 762 F.2d 185 (2nd Cir. 1985). Therefore, the district court determination in the Cartage case binds Mason, so its challenge to the market rate fee award is also barred.

II. THE CASES RELIED UPON BY PETITIONERS ARE DISTINGUISHABLE SO THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

A. Petitioners Cases Are Distinguishable Because They All Involve Fee Awards In Favor Of A Non-Party.

According to the petitioners, the seventh circuit's decision conflicts with the decisions in *Harper v. Better Business Services, Inc.*, 961 F.2d 1561 (11th Cir. 1992); *Devine v. National Treasury Employees Union*, 805 F.2d 384 (Fed. Cir. 1984); *Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984); *Anderson v. Department of Treasury*, 648 F.2d 1 (D.C. Cir. 1979), supplemental opinion sub nom, *National Treasury Employees Union v. Department of Treasury*, 656 F.2d 848 (D.C. Cir. 1981) (Petition pp. 9-12). However, these cases are all easily distinguishable because they involve fee awards not to a litigant, but instead to non-party unions that provided legal services to their members under prepaid legal service programs. In contrast, attorneys fees were awarded in these cases solely to the

prevailing party, Central States. This distinction is critical because the American Bar Association Standing Committee on Ethics and Professional Responsibility has determined that when a fee award is made directly to the prevailing party, the ethical concerns that were the basis of the decisions cited by petitioners are not implicated.

In *Harper, Devine, Goodrich* and *Anderson,* individuals vindicated rights under statutes that authorized fee awards. In each case, the individuals were represented by attorneys employed by unions pursuant to prepaid legal service plans. Because the services were provided under the legal services plans, the unions insisted that the fee award belonged to the union,[1] not to the litigant or the attorneys employed by the union who performed the work. Each court indicated that under these circumstances, a fee award in favor of the union at the market rate was impermissible because it would violate the ethical rules that prohibit attorneys from splitting fee awards with laymen or allowing laymen to engage in the unauthorized practice of law.[2] Petitioners readily concede that these cases involve fee awards made directly to the non-party union instead of the litigant.[3]

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[1] In *Anderson* and *Devine,* the union was eventually the appellant, instead of the aggrieved individual whose rights were vindicated in the litigation.

[2] The *Anderson* court indicated that the fee award would violate a third rule that allowed attorneys to accept employment at an organization offering prepaid legal services only if it was operated on a not-for-profit basis. *Anderson,* 656 F.2d at 851. Since Central States is not a prepaid legal services organization, this objection is not applicable. Moreover, this restriction was lifted under the 1983 ABA Model Rules. American Bar Association Informal Opinion 85-1510.

[3] Thus, Petitioners indicate that *Devine* involved "the award of attorneys fees *to the union*", that *Harper* involved a decision "to limit the amount of attorneys fees to be awarded *to plaintiffs lawyer*" and that *Goodrich* held that "*a salaried attorney* is only

Section 502(g)(1) of ERISA authorizes a fee award to "either party," not to the attorney for either party. 29 U.S.C. § 1132(g)(1). As a result, the judgments in these cases were rendered in favor of Central States, not in favor of its in-house attorneys. And when respondents pay the fee awards, their payment will be made directly to Central States so there will be no money passing from attorney to client. Therefore, there is no danger that fees will be shared with a non-lawyer and the judgment for fees at the market rate does not implicate any ethical considerations.

The American Bar Association's Committee on Ethics and Professional Responsibility has indicated in Formal Opinion 95-392 that a fee award at market rates under the circumstances of these cases does not violate any ethical principles:

> Under certain fee-shifting arrangements the courts award legal fees to the parties. Under others the fee award is made to the lawyers. *Because in the former case the fee is directed to the corporation, no ethical question is raised; the lawyer is not placed in a position in which she is being asked to share fees with a nonlawyer.* However, it is in the latter situation, where the lawyer is awarded the fee and the corporation seeks from the lawyer some or all of the fee award, that ethical questions are raised to which this portion of the opinion is addressed.

(Respondents' Appendix 19-20) (emphasis added). Formal Opinion 95-392 then endorses the *Anderson* decision but only after noting that the fee award was sought by a union that employed the attorneys, not the prevailing litigant. Since the ethical issue that was central to the cases relied upon by petitioners does not exist in these cases, petitioners' cases are distinguishable and no conflict between the circuits exists.

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entitled to attorneys' fees calculated at a cost-plus-overheard rate." Petitioner at pp. 10-11 (emphasis added).

B. Petitioners Cases Are Distinguishable Because The Courts Were Not Required To Consider Opportunity Cost Or The Difficulty In Allocating Business Costs To Legal Operations.

The unions in the cases cited by petitioners were required to represent their members pursuant to prepaid legal service plans. If the unions delayed in pursuing the claims, the cost of the delay was borne by the individual member, not the union. For this reason, the unions could not argue that they were entitled to be compensated for the opportunity cost of their attorneys' time.

However, because Central States is the litigant, it was forced to bear the cost of delaying other legal matters or hiring outside counsel because its in house attorneys were busy with these cases. Because this opportunity cost has to be considered in order to fully compensate Central States, the court of appeals correctly determined that the value of the services of in-house counsel was the market rate.

In addition to failing to consider opportunity costs, the cases relied upon by petitioners are distinguishable because Central States showed that calculating the costs attributable to these cases would be exceedingly difficult. Adoption of a cost based calculation would obligate the lower courts to devise a formula to pro-rate overhead expenses attributable to base rent, real estate taxes, costs of maintaining common areas, janitorial services and utilities (such as telephone, heat, electricity and water). In addition, expenses such as the amortization of capital expenditures including law library, computers, copy machines, fax machines, office dictating equipment, telephones, word processing equipment, laser printers, liability insurance and other expenses, which are shared with other departments, would also have to be prorated. To determine actual cost, it also would be necessary to attempt to prorate both the labor costs and physical building overhead of the departments of Central States other than

the law department which perform essential services for Central States' legal staff (e.g., human resources, computer operations, internal audit, payroll and mail room departments). In a private law firm that is devoted solely to the practice of law, it is not necessary to prorate these services. However, in the in-house setting, there are employees that perform many services for the non-legal aspects of the operation as well as the law department and it would be exceedingly difficult to determine an appropriate proration.

The complexity of the task of arriving at an opportunity cost for attorneys time and allocating costs is daunting and entirely inconsistent with this Court's admonition that "a request for attorney's fees should not become a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). On the other hand, using prevailing market rates to calculate fees for in-house counsel eliminates these problems and "simplifies the district court's already difficult task of awarding reasonable attorneys fees." *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 861 (7th Cir. 1981).

Petitioners argue at length that the market rate allows Central States to profit from the services of its in-house counsel. However, the court of appeals determined that the actual value of the work performed by in-house counsel was equal to the market rate. Since the market rate award compensated Central States for the actual cost of the services of in-house counsel and nothing more, Central States did not earn a profit and no fee sharing occurred.

C. Petitioners' Cases Are Distinguishable Because They Did Not Involve Suits By Non-Profit Organizations Under Legislation Intended To Encourage Private Enforcement Actions.

The cases cited by petitioners involved individuals seeking to redress adverse employment actions by the federal government or collect damages limited by statute

to $1,000. These cases are distinguishable because they were not brought by a not-for-profit entity such as Central States and did not implicate the federal policy embodied in ERISA intended to foster trustee suits filed to force employers to comply with their pension promises. Indeed, the *Goodrich* and *Devine* courts recognized that this Court's decision in *Blum* mandated that fees be awarded at market rates where, as in these cases, the prevailing party was a not-for-profit organization and the applicable statute was intended to foster private enforcement actions. *Devine*, 805 F.2d at 388; *Goodrich*, 733 F.2d at 1580-1.

When Congress amended ERISA in 1980 the sponsors of the legislation indicated that

> [D]elinquencies of employers in making required contributions are . . . a serious problem for many multiemployer plans . . . the public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection.

126 Cong. Rec. 23039 (Rep. Thompson), 126 Cong. Rec. 23288 (Sen. Williams). To achieve this goal, Congress added § 515 which forecloses most employer defenses[4] and amended § 502 to make an award of attorneys fees, interest and liquidated damages mandatory when a fund obtains a judgment for delinquent contributions. 29 U.S.C. § 1132(g)(2)(B), (C) and (D) and § 1145. Because the legislative history and provisions of the statute itself demonstrate a federal policy encouraging this type of litigation, the cases cited by petitioners are distinguishable so *Blum* controls and requires that fees be awarded at market rates.

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[4] See, *Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (*en banc*).

CONCLUSION

For the foregoing reasons, respondents submit that the petition for writ of certiorari be denied.

THOMAS C. NYHAN *
General Counsel
ALBERT M. MADDEN
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
PENSION AND HEALTH
AND WELFARE FUNDS
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800
Attorneys for Respondents

* Counsel of Record

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 93 C 7497

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS and HOWARD MCDOUGAL, TRUSTEE,
Plaintiffs,

-vs-

MASON & DIXON LINES, INC.,
Defendant.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE HARRY D. LEINENWEBER

Chicago, Illinois
April 28, 1994

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[2] THE CLERK: 93 C 7497, Central States vs. Mason & Dixon Lines.

MR. MORAN: Good morning, your Honor. Patrick Moran for the defendant, Mason & Dixon Lines.

MR. COCO: Good morning, your Honor. Robert Coco appearing on behalf of plaintiff.

MR. MURDOCK: Good morning, your Honor. Grady Murdock also on behalf of defendant.

THE COURT: Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund and Howard McDougal, are a pension fund and its trustee. Both the pension fund and the trustee are subject to the requirements of the Employee Retirement Income Security Act of 1974 [ERISA], 29 U.S.C., Section 1001-1381. De-

fendant, The Mason & Dixon Lines, Inc., is a contributing employer to plaintiff's pension fund. The trust agreement between the parties in this action provides that defendant must "promptly furnish to the Trustees, upon reasonable demand" documents pertinent to defendant's contributions to the pension fund.

On June 25, 1993 plaintiffs notified defendant that they would like to review documents verifying the contributions defendant made to the pension fund. On July 25 and August 20, 1993 a representative of defendant notified plaintiffs that defendant could not [3] satisfy plaintiffs' request for a review of documents at that time. Defendant notified plaintiff that its resources were being used to respond to plaintiffs' request for document production in another case before this court. On November 30, 1993 an attorney for plaintiffs renewed their request for an audit of defendant's books. Defendant did not respond to the letter and the present suit was filed in January of 1994.

Plaintiffs have moved for summary judgment, asking the court to order defendant to give them access to records they need to investigate the contributions defendant made to the pension fund. In addition, plaintiffs maintain that they are entitled to all audit costs, attorneys fees and court costs incurred as a result of defendant's failure to respond to their request promptly.

Defendant has agreed to provide plaintiffs access to the records they seek. The Court finds that defendant must provide access as soon as possible, even if it must hire additional labor to satisfy plaintiffs' demands.

In addition, the Court finds that defendant must compensate plaintiffs for the reasonable attorney's fees they incurred as a result of bringing the present [4] action. Section 502(a)(3) of ERISA, 29 U.S.C., Section 1132 (a)(3), provides that a civil action may be brought "to redress . . . violations or to enforce any provision of the terms of the plan." Section 502 also expressly grants the Court discretion to allow "reasonable attorney's fees and costs of action to either party."

The Court finds that defendant violated the terms of the trust agreement between the parties in this case. That agreement required defendant to provide information to plaintiffs "promptly." Instead, on some occasions defendant failed to respond to plaintiffs' requests for information. When defendant did reply to plaintiffs' inquiries, its explanations for the delay were inadequate. For these reasons the Court finds that plaintiffs are entitled to their reasonable attorney's fees incurred in bringing the present action.

Lastly, the Court finds that plaintiffs must bear the costs they would ordinarily incur in auditing defendant.

Plaintiffs' motion for summary judgment is granted in part and denied in part. Defendant's motion for summary judgment is denied.

All right. Where does that leave us?

MR. COCO: That leaves us with getting an audit scheduled and conducted.

[5] THE COURT: How long will that take? You have got the documents, don't you?

MR. COCO: I recall from discussing with our auditors, and I think we indicated in our files—I don't have it in front of me. I don't want to misrepresent. But I think they said it would take four to six weeks—

MR. MORAN: Two to six.

MR. COCO: —two to six weeks to conduct the field work. And it will probably take at least a couple weeks thereafter to compile a memo.

THE COURT: How about three months for a status. If you get your audit in, you can come in ahead of time, if you want.

MR. COCO: Right. That would sound reasonable.

THE COURT: Three months.

THE CLERK: July 28th, at 9:00 a.m.

THE COURT: Thank you.

MR. MORAN: Thank you, your Honor.

MR. COCO: Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 91 C 6232

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,
Plaintiff,

-vs-

CENTRAL TRANSPORT,
Defendant.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE HARRY D. LEINENWEBER

Chicago, Illinois
October 11, 1994

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[2] THE CLERK: 91 C 6232, Central States vs. Central Transport.

MR. MADDEN: Good morning, your Honor. Albert Madden on behalf of the plaintiffs.

MR. PARZIANELLO: Eric Parzianello on behalf of the defendants, your Honor.

THE COURT: This is a ruling.

Plaintiffs brought this ERISA action against defendants Central Transport, Inc. and Central Cartage Co. to, among other things, collect audit-revealed delinquent contributions to their funds. The funds provide pension coverage and health benefits to union employees covered by collective bargaining agreements with defendants.

On August 25, 1994 the Court granted plaintiffs' motion for summary judgment as to Count I of the com-

plaint, which involved the delinquent contributions, against both Transport and Cartage. Plaintiffs had previously won summary judgment against both defendants on Count II of the complaint, which sought access to defendants' records. Counts III and IV of the complaint were directed solely against Transport, and sought to recover a debt originally incurred by a company that later merged with Transport on two alternative theories of recovery. Transport was granted summary judgment [3] as to Count III in the August 25 order. Count IV was found to involve disputed material facts, and is still at issue.

Pursuant to Rule 54(b), plaintiffs now request that a final judgment be entered in their favor against Cartage in the following amounts: 1. Central States, Southeast and Southwest Areas Pension Fund: $1,944,626.60 in delinquent contributions and $1,892,528.90 in doubled interest, as of 10/11/94, for $3,837,155.50. 2. Central States, Southeast and Southwest Areas Health & Welfare Fund: $52,504.20 in delinquent contributions and $49,861.38 in doubled interest, as of 10/11/94, for $102,365.58.

Interest on the Pension Fund amount accrues at $483.02/day, and interest on the Health and Welfare Fund amount accrues at $13.04/day.

Cartage does not dispute these amounts, nor does it dispute the $57,033.94 in audit fees, and $1,767.75 in audit costs, also sought by plaintiffs. It does dispute, however, the $56,593.88 in attorneys' fees and $4,189.61 in costs requested by plaintiffs. Cartage's objections are twofold. First, it argues that because plaintiffs' attorneys are plaintiffs' own employees, to award them attorneys' fees based on market rates would result in a windfall for the funds. [4] It maintains that any fee award should be limited to the amount that plaintiffs actually spent in prosecuting this action, that is, their lawyers' salaries plus overhead.

The use of a cost-based, rather than a market-rate, method, however, unnecessarily complicates the already

difficult task of determining reasonable attorney fees. State of Ill. v. Sangamo Constr. Co., 657 F.2d 855, 861-862 (7th Cir. 1981). In addition: "For every hour that in-house counsel spent on this case, plaintiffs lost an hour of legal services that could have been spent on other matters. The value to plaintiffs of this lost time is, of course, the amount it would require to hire additional counsel to do the neglected work." Textor v. Board of Regents of N. Ill. Univ., 711 F.2d 1387, 1397 (7th Cir. 1983). Therefore, the Court will calculate plaintiffs' attorneys' fees according to a market-rate standard.

Cartage's second argument is that plaintiffs' time logs do not distinguish between the time spent working on their successful claims against Cartage, that is, Count I and II, and time spent on Counts III and IV, which are separate theories of recovery directed solely against Transport that plaintiffs have not prevailed upon. It is well settled that if a suit is [5] comprised of unrelated claims, the hours spent on unseccessful claims should be excluded from determining a fee aware. Hensley v. Eckerhart, 103 S.Ct. 1933, 1943 (1983). Plaintiffs acknowledge this, though, and only ask for seventy-five percent of their total costs and fees, which they estimate was the percentage of time spent on their claims against Cartage. The Court finds this figure to be reasonable in light of the fact that the bulk of time spent on motions and discovery in this case related to plaintiffs' claims against Cartage.

Cartage does not challenge the reasonableness of any of the individual time entries submitted by plaintiffs. Nonetheless, the Court has reviewed the entries, and generally finds them to be reasonable, with a few exceptions. First, plaintiffs claim at least 48.2 hours of unexplained discovery work, typically described only as "review and revise discovery materials." Because of the vagueness of these descriptions, the Court has reduced these entries by twenty-five percent of $1,355.63. See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 776 F.2d 646, 656-658 (7th Cir. 1985). Similarly, the Court also

reduces by twenty-five percent the time spent on thirty-two "conferences re status," billed by Mr. Madden at .3 each, for a total of $270.00 This reduction does not apply to conferences [6] more fully described as regarding discovery, the audit, or other matters.

The Court also finds that the 2.0 or 2.5 hours billed by Mr. Madden for each court appearance is excessive. Accordingly, the time for each appearance has been reduced to one hour, for a total reduction of $1,687.50. In addition, the Court disallows the 4.5 hours, or $506.25, billed by Mr. Madden on 12/15/93 to review the file. Anyone who spent as much time as Mr. Madden did on this case should not need to take half a day to familiarize himself with the file midway through litigation. Finally, the Court notes that the Westlaw charges billed by plaintiffs as costs are more appropriately recovered as attorneys' fees, but the final effect is the same in this case because plaintiffs have been awarded both costs and fees.

Therefore, pursuant to Rule 54(b), the Court finds that all claims regarding Cartage have been resolved, and hereby enters final judgment against it in favor of plaintiffs. Plaintiffs are awarded the unpaid contributions and doubled interest as described earlier. The Court also awards plaintiffs a total of $56,964.11 in attorneys' fees and costs, and $58,801.68 in audit fees and costs, to be allocated equally between the Pension Fund and the Health & Benefit Fund. [7] Plaintiffs are directed to resubmit their proposed final judgment order consistent with this opinion within seven days.

MR. MADDEN: Thank you, your Honor.

MR. PARZIANELLO: Thank you.

(Which were all the proceedings had in the above-entitled cause.)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

February 26, 1996

Before HON. FRANK H. EASTERBROOK, Circuit Judge

Nos. 94-3823, 95-1872 and 95-1976

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND, and ROBERT J. BAKER, TRUSTEE,
Plaintiffs-Appellees,

v.

CENTRAL CARTAGE COMPANY and CENTRAL TRANSPORT, INCORPORATED,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 91 C 6232—Harry D. Leinenweber, Judge

Upon consideration of:

1. "APPELLEES' STATEMENT OF ATTORNEYS' FEES" filed on February 5, 1996, by counsel; and,

2. "RESPONSE TO APPELLEES' STATEMENT OF ATTORNEYS' FEES" filed on February 20, 1996, by counsel for appellants,

IT IS ORDERED that the appellees are awarded attorneys' fees in the amount of $17,467.50.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 13, 1996

Before
HON. JOHN L. COFFEY, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. TERENCE T. EVANS, Circuit Judge

No. 95-2026

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD MCDOUGALL, Trustee,
Plaintiffs-Appellees,

v.

THE MASON AND DIXON LINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 93 C 7497—David H. Coar, *Judge*

ORDER

Our order of February 7, 1996, granted the Pension Fund's request for an award of attorney's fees on appeal. Notwithstanding that order, Mason & Dixon Lines opposes both the fact and the amount of the award sought.

1. The employer's argument against *any* fees ignores the ground on which this court awarded them: not that

the employer's position on appeal flunked the "substantial justification" requirement, but that the Pension Fund had been awarded legal fees in the district court and was entitled to an award for the legal time necessary to defend them on appeal. See *Commissioner of INS v. Jean*, 496 U.S. 154 (1990). The court's order awarding fees stands.

2. The employer does not dispute the hourly rates the Pension Fund uses but nonetheless asks us to cut the Pension Fund's request in half. There is no basis for that step. The calculations in the Pension Fund's statement of fees are sound, and a total of $10,707.07 is a modest amount for the work reflected in the brief filed in response to the employer's appeal.

Accordingly, the Pension Fund is awarded a total of $10,926.67 on account of costs and legal fees.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 95-392 April 24, 1995
Sharing Legal Fees with a
For-Profit Corporate Employer

If a corporate in-house lawyer provides services to third persons for a fee, the lawyer violates Model Rule 5.4(a) if the lawyer turns over to the corporation any portion of the fee beyond the cost to the corporation of the services provided. Similarly, if an in-house lawyer represents her corporate employer in successful litigation in which counsel's fees are awarded to the lawyer, it is a violation of Model Rule 5.4(a) for her to share with the corporate employer any portion of the fees awarded to her beyond the amount that would reimburse the corporation for the corporation's cost of its in-house counsel's handling of the matter.

The Committee has received two inquiries raising questions concerning the ethical propriety of allowing cor-

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This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 541 North Fairbanks Court, 14th Floor, Chicago, Illinois 60611-3314 Telephone (312) 988-5300 CHAIR: Margaret C. Love, Washington, DC ☐ Richard L. Amster, Roseland, NJ ☐ Deborah A. Coleman, Cleveland, OH ☐ Ralph G. Elliot, Hartford, CT ☐ Lawrence J. Fox, Philadelphia, PA ☐ David B. Isbell, Washington, DC ☐ George W. Jones, Jr., Washington, DC ☐ Marvin L. Karp, Cleveland, OH ☐ Arthur W. Leibold, Jr., Washington, DC ☐ Kim Taylor-Thompson, Stanford, CA ☐ CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Joanne P. Pitulla, Assistant Ethics Counsel.

porations to receive payment for certain work performed by in-house counsel. The first situation involves a corporation that is not generating enough legal work to keep its salaried lawyers busy. The Committee has been asked whether it is proper for such a corporation to "rent" its in-house lawyers to perform legal work for other clients, and to collect a fee for the services at an hourly rate higher than the cost to the corporation of employing them. The second situation the Committee has been asked to consider is that of a lawyer working in-house at a corporation who successfully litigates a case on behalf of the corporation and is in a position to seek an award of lawyer's fees under a fee-shifting statute. May the lawyer share with her corporate employer a "reasonable attorney's fee" based on an hourly rate that exceeds the cost the corporation incurred in employing the lawyer?

The Committee is of the view that the two situations described above present examples of ethically improper fee sharing, if the in-house counsel is required to share legal fees with the nonlawyer corporate employer. These arrangements certainly run afoul of the literal language of Rule 5.4(a) of the Model Rules of Professional Conduct (1983, as amended), which provides that a "lawyer or law firm shall not share legal fees with a nonlawyer. . . ." The Committee also concludes that these two arrangements, unlike the arrangement condoned in Formal Opinion 93-374 (Sharing of Court-Awarded Fees With Sponsoring Pro Bono Organizations), violate not only the literal language but also the reasons behind Rule 5.4(a)'s prohibition.

Rule 5.4 of the Model Rules of Professional Conduct is titled "Professional Independence of a Lawyer," and the purpose of its provisions is to safeguard that independence and prevent problems that might occur when nonlawyers assume positions of authority in business arrangements

with lawyers.[1] Among the problems Rule 5.4 seeks to prevent, the most important is interference by lay persons with a lawyer's practice. The involvement of nonlawyers, such as corporate employers, in the legal process is of concern because the lawyer's independent professional judgment can be impaired by the influence and control of nonlawyers who, by definition, are not subpect to the same ethical mandates regarding independence, conflicts of interest, confidentiality, fees and the other important

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[1] Model Rule 5.4 provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that law the agreed-upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

provisions of the profession's code of conduct. "[F]ee splitting between lawyer and layman . . . poses the possibility of control by the lay person, interested in his own profit, rather than the client's fate . . . ." *Emmons, Williams, Mires & Leech v. State Bar*, 6 Cal. App. 3d 565, 573-74, 86 Cal. Rptr. 367, 372(1970).

An examination of the history of Rule 5.4(b), prohibiting lawyers from practicing law in partnership with nonlawyers, provides compelling evidence that the ABA's disapproval of fee sharing historically has been tied to the desire to prevent lay influence of a lawyer's professional judgment. In 1976, the Kutak Commission, which was appointed to recommend revisions to the 1969 Model Code of Professional Responsibility, proposed a rule that was designed to prevent the dangers inherent in fee sharing without prohibiting fee sharing altogether. That rule proposed that lawyers be allowed to share fees with nonlawyers, even in profitmaking enterprises, so long as the nonlawyers agreed not to influence the lawyer's independent professional judgment and to abide by the rules of legal ethics regarding confidentiality, solicitation, and legal fees. However, when the ABA House of Delegates debated a final draft of the rules, a delegate asked if the proposed rule would "permit a business corporation such as Sears Roebuck or H & R Block to open law offices staffed by salaried lawyers in shopping centers across the country." The Reporter responded affirmatively. An impassioned debate then followed and the ABA House of Delegates rejected the proposed rule and instead adopted an absolute ban on fee sharing, continuing the previous ban in DR 3-103(A) of the Model Code of Professional Responsibility. This history demonstrates that the present rule reflects grave concern regarding corporate involvement with law firms and lawyers, especially involvement that was tied to the sharing of legal fees. *See* Roy D. Simon, Jr., Fee Sharing Between Lawyers and Public Interest Groups, 98 YALE L.J. 1069, 1082-1083 (1989).

For the reasons Rule 5.4 was adopted and for the reasons articulated below, the Committee concludes that, while a corporation should be free to require its lawyers to reimburse its costs of employing in-house counsel when the lawyers do work for others, or to be made whole for the costs it actually incurred in a case when its lawyers are awarded fees by a court, a corporation may not reap profits from the work of its in-house attorneys. The arrangements that are the subject of these inquiries run the risk of further "transforming the practice of law into an ordinary commercial business, with the resulting unrestricted emphasis on the hard sell and the bottom line," and violate Model Rule 5.4(a) both in word and spirit. Simon, *supra* at 1132.

A Corporation's Practice of Charging Other Businesses for the Services of Its Salaried In-House Attorneys, at a Rate Higher Than Their Hourly Cost to the Corporation, Amounts to Improper Fee Sharing with Nonlawyers

If anything is clear under Model Rule 5.4, it is that a corporation cannot hire one or more lawyers, pay them salaries, make their services available generally to others, and directly receive the fees for the lawyers' work. This is precisely the scenario that propelled the ABA House of Delegates to adopt present Model Rule 5.4(a). When stripped of the facts relating to the corporation's motive for "renting" its in-house counsel—the corporation does not have enough work to keep the lawyer busy full-time—the question presented by this inquiry is whether a corporation can do exactly the same thing by renting out part, rather than all, of the time of the lawyer employees. The Committee concludes that the answer is clearly that it cannot, since the same concerns that prompted the rule barring the full-time employment of lawyers by corporations to provide third party service for profit to the corporation are present here: first, avoiding the possibility of a nonlawyer's interference with the exercise of a lawyer's

independent professional judgment; second, ensuring that the client is treated fairly by not being overcharged.

Regarding the first concern, it is clear that if the proposed arrangement were permitted, the profit potential to the corporation would encourage greater interference with the professional judgment of a lawyer than would occur if the corporation simply were to receive reimbursement of costs. If in-house counsel were "rented" at a profit by their employers, the employers could have a greater incentive to have a say in selecting the matters the lawyers could undertake during their extra time. Furthermore, the corporation would be further encouraged to decide how much of its attorneys' time would be spent on outside matters. And, as is evidenced by the inquiry posed to the Committee, the corporation would have a real motive to determine the fees to be charged to the clients. Each of these decisions, and others like them, should be the decisions of the lawyer. If the profession were to permit these decisions to be made by corporations, it would, in effect, be permitting lay persons to interfere in the professional judgment of lawyers or engage in the unauthorized practice of law.

The second major concern with the proposed arrangement is that the fees charged to clients by the corporation may be excessive. Because a corporate entity is not subject to the ethical rules governing the legal profession, it is possible that if a corporation were given the authority to set fees for others' use of its in-house counsel, it would set them at unreasonable rates. For-profit corporations, by definition, are motivated by anticipated profits and concerned with the "bottom line." Indeed, that motivation is evidenced in the situation presented by this inquiry —because the corporation cannot keep the lawyers busy on a full-time basis, the corporation wants to rent out its lawyers at a rate that would earn a profit for the corporation. If a corporate entity is permitted to set its lawyers' fees at whatever rate it chooses, such fees run the risk of

being unreasonable. Unlike the situation where fees are set by the lawyer, who is restricted by the ethical mandate of Model Rule 1.5, there are no such limitations on the corporation.

The risk of overcharging the clients served by the in-house lawyer would be much less if the corporation were to be reimbursed only for the actual cost of allowing their in-house counsel to serve others. While this would not eliminate the possibility that the reimbursement rate itself was unreasonable, it would at least remove the problems that arise when a corporation is in a position to view its legal department as a profit center.

It is permissible for the in-house lawyers, rather than the corporation, to receive a reasonable fee beyond the amount the lawyers cost the corporation. So long as the lawyers do not permit any interference by the corporate employer with their professional judgment and are in a position to give conflct-free representation to their other clients, there is nothing unethical about the arrangement.

Other ethics committees that have considered the issue agree that a corporation should not be permitted to reap a profit from the services of its attorneys. The Legal Ethics Committee of the District of Columbia Bar concluded that in-house counsel may provide legal services to clients of a corporation provided that *none of the fees* generated by the services go to nonlawyers except to compensate staff workers under the lawyer's supervision. District of Columbia Bar, Legal Ethics Committee, Opinion 135 (1984). That committee's concern was that if fees went to nonlawyers, the nonlawyers would have the ability to influence the lawyer's professional judgment. The Ethics Committee of the Massachusetts Bar Association followed the same line of reasoning in concluding that an attorney employed by a bank could not participate in an arrangement in which the bank charged mortgagors more for the attorney's services than the bank's own costs for attorney's services. Massachusetts Bar Association

Ethics Committee, Opinion 84-1 (1984). Likewise, in a Dallas Bar Association opinion, the Legal Ethics Committee stated, "An attorney is considered to be sharing legal fees with a nonlawyer forming a partnership with a nonlawyer for the practice of law if the employing corporation reaps any benefit, reward or profit from the attorney's provision of legal services to third parties." Dallas Bar Association, Legal Ethics Committee, Opinion 1982-3 (1982). This Committee agrees with these views and adopts what already appears to be the consensus on this issue: corporate counsel may not be used to earn money for a for-profit employer.

It has been suggested that in the proposed situation the corporation technically would not make a "profit" from the attorneys' fees because the funds received by the corporation would, in total, be less than the costs of running the legal department. The Committee does not believe that this argument changes the analysis. The corporation is still reaping more than reimbursement for its costs of employing its lawyers, and even if the funds were to be pumped back into the legal department, the corporation still would have the same incentive to interfere with the independence of the lawyer to maximize its ability to recoup its losses or free up funds for the corporation's general use.

The Contribution of Court-Awarded Fees to a Corporate Employer, When the Fees Amount to More than the Employer's Cost for the Services, Is Improper Fee Sharing with Nonlawyers

Under certain fee-shifting arrangements the courts award legal fees to the parties. Under others the fee award is made to the lawyers. Because in the former case the fee is directed to the corporation, no ethical question is raised; the lawyer is not placed in a position in which she is being asked to share fees with a nonlawyer. However, it is in the latter situation, where the

lawyer is awarded the fee and the corporation seeks from the lawyer some or all of the fee award, that ethical questions are raised to which this portion of the opinion is addressed.

The literal language of Rule 5.4(a) is clear, flatly prohibiting a lawyer from sharing the profits and losses of a law practice with a nonlawyer even when the lawyer retains control over all legal aspects of the business. The literal application of Rule 5.4(a) prohibits a lawyer from sharing with a corporation a court-awarded fee when that fee is greater than the costs of the lawyer's services to the corporation.

Furthermore, the purpose of Rule 5.4(a), to prevent lay interference with a lawyer's professional independence, would be ignored if a corporation were allowed to make a profit in this fashion. Certainly, the attorneys' themselves would be entitled to court-awarded fees. And it would not be problematic for the corporation to be reimbursed for its out-of-pocket costs attributable to a particular case. But allowing a lawyer to share with a corporation more than its costs in the litigation would give corporations an incentive to pursue litigation (and even an incentive to purchase claims of others) that went beyond the merits of the claims themselves, creating a situation in which the provision of legal services by in-house lawyers became a profit center for the enterprise. And once the corporation found itself with an opportunity to create a profit center from its employment of lawyers, the corporation's incentive to interfere with its lawyers' handling of matters would be enhanced. Given that a corporation unquestionably has the *power* to influence its employees (including lawyers), it is surely unwise to also give it the additional incentive to do so. Interference by the corporation with its in-house lawyers' practice, motivated by this profit opportunity, would amount to the unauthorized practice of law and should not be permitted or encouraged.

This interpretation of Rule 5.4(a) follows the same reasoning employed by the court in *National Treasury Employees Union v. U.S. Dept. of Treasury*, 656 F.2d 848 (D.C. Cir. 1981). In that case, where two attorneys were salaried employees of a union and were compensated by the union at rates well below market value, the union sought the market value of services rendered in its request for court awarded fees to its lawyers under a fee-shifting statute, and claimed that the fees belonged to it rather than to the lawyers. The Court ruled that an award of attorney's fees could not exceed the union's financial outlay because anything more would result in a profit to the union. The union could not be permitted to reap a profit on the services its lawyers had furnished because that would necessarily involve the union in the unauthorized practice of law. The Court stated that the ethical maxims it was honoring were valuable as safeguards against the imposition through lay control of incompetent and irresponsible law practice on the public.

The situation presented to the Committee is analogous to the *National Treasury* case. Despite the fact that here the Committee is confronted with a profit-seeking corporation rather than a union, the ethical considerations remain the same and for the same reasons it would be improper to allow the corporation to recover more than its financial outlay.[2]

This Committee recognized an exception to the rule prohibiting fee sharing in Formal Opinion 93-374. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-374 (1993). In that opinion this Committee decided that it was not improper for a lawyer to agree to share court awarded fees with a non-profit organiza-

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[2] *See also People v. People's Stock Yards State Bank*, 176 N.E. 901 (Ill. 1931) (bank's practice of retaining court-awarded fees based on work done by the legal department on foreclosure suits on loans owned by the bank condemned because bank was engaging in unauthorized practice of law.)

tion that sponsors litigation. While that opinion is important, it is distinguishable from this situation because, although both involve court-awarded fees, the organization seeking those fees in the situation at hand is a for-profit corporation, not a non-profit corporation or other organization.

In Formal Opinion 93-374 the Committee recognized that, when court-awarded fees are involved, *one* of the inherent dangers of fee sharing with nonlawyers is not present: the risk of charging excessive fees to clients. When a court decides the proper amount of fees to award an attorney, a reasonable expectation is that the fee will be fairly determined and proportionate to the work performed.

Moreover, Formal Opinion 93-374 made it clear that the exception to the literal language of Model Rule 5.4 was limited to non-profit organizations because the expectation of receiving a fee is unlikely in these circumstances to be the source of lay interference with the lawyer's professional judgment. The fact "that the entity with which such fees are shared is a non-profit entity [is] a fact that has weight both in relation to the letter and purposes of the Model Rules and as a legal matter."

As the Opinion noted:

> For the non-profit organization, any incentive to intervene in sponsored litigation is much more likely to relate to the merits of the case, rather than the expectancy of a fee award; the element of a fee, in other words, does not provide a reason why the prohibition of paragraph (c) is not sufficient in the circumstances. That consideration is what distinguishes the case of a staff lawyer working for a non-profit organization from the case of a lawyer employed by a for-profit organization sponsoring litigation, at least for purposes of the prohibition on fee sharing in Rule 5.4(a).

The opinion then went on to observe that its view that Rule5.4(a)'s prohibition against fee sharing only applies to for-profit corporations

> is supported by the provisions of paragraph (d) of the Rule, which applies its prohibition on lay participation in the practice of law only to corporations and associations 'organized to practice law for a profit.' This provision recognizes that even though a non-profit organization may well have an economic interest in securing sources of funds, including court-awarded attorney fees, to support its otherwise economically disinterested activities, the danger of improper lay interference in such circumstances is minimal.

We, therefore, conclude that a for-profit corporation should not share in court-awarded attorney's fees with respect to services provided by its lawyer employees, to the extent such fees are in excess of the corporation's cost of providing the legal services in question. It is permissible for the corporation to be reimbursed for its costs, and its lawyers can receive directly fees in excess of the corporation's cost, but it is unethical for the lawyer to share that excess with the corporation.

Conclusion

For the reasons stated above, we conclude that both of the proposed arrangements are improper and violate both the literal language of and principles behind Rule 5.4(a).